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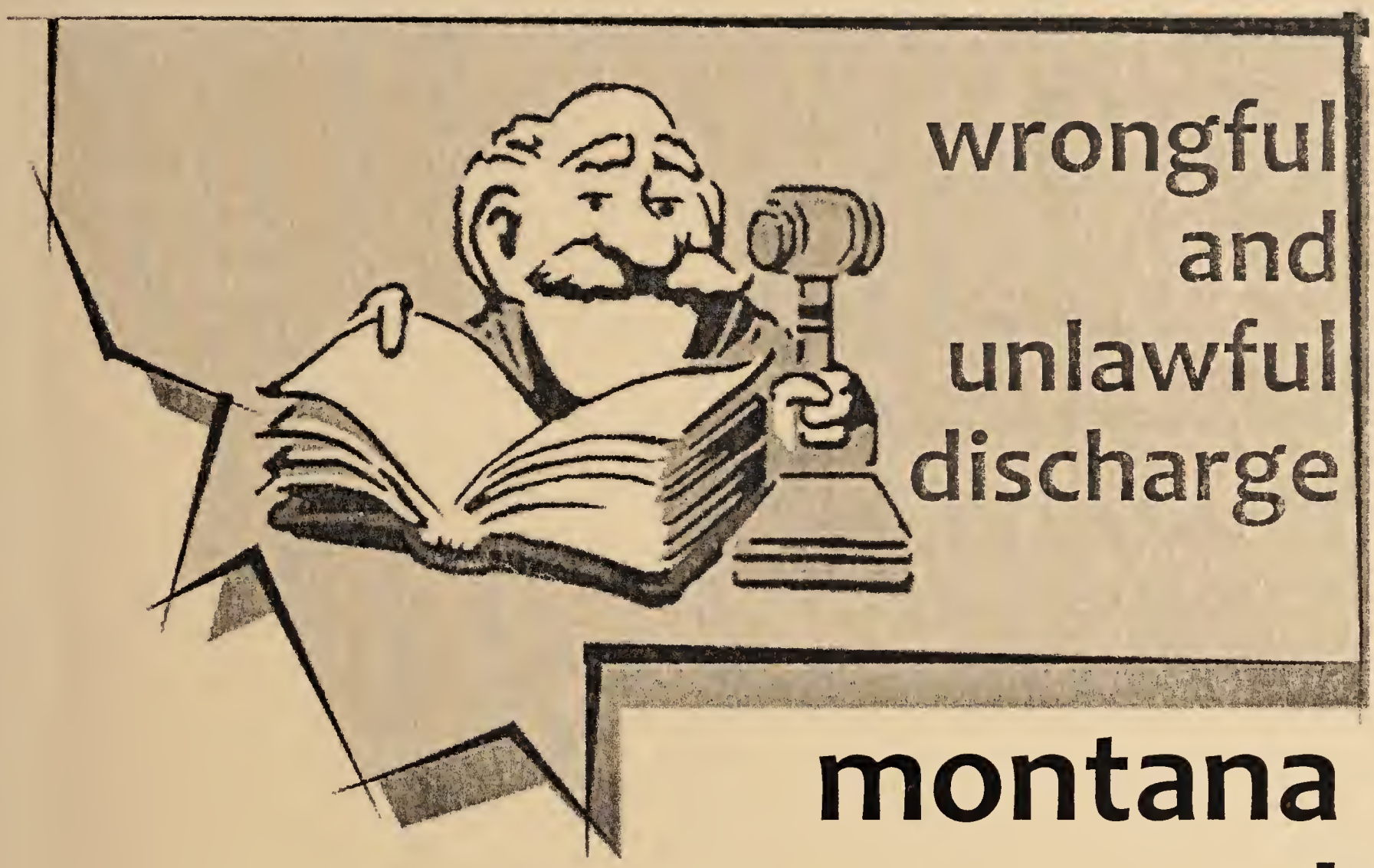

montana cases and considerations

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To get more information on training available from the Professional Development Center — in particular the seminar "Montana's Wrongful Discharge Act" — call 444-3871 or visit our website: pdc.mt.gov

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Wrongful and Unlawful Discharge: Montana Cases & Considerations

Montana courts have seen a large number of cases dealing with wrongful and unlawful discharge. In the mid-1980s, the state gained a reputation for judicial decisions that greatly favored employees in cases against their former employers. "Liberal" consideration of tort law and high awards to plaintiffs, along with the general move toward tort reform, led to the passage of the Wrongful Discharge from Employment Act in 1987. (A text of the law appears in the appendix.)

On June 29, 1989, the Montana Supreme Court upheld the constitutionality of the Wrongful Discharge from Employment Act (see *Meech v. Hillhaven,* page 46). Thus, many of the tort actions described in this summary no longer apply to the employment relationship. However, the Court has expanded the options available to employees under collective bargaining agreement and, possibly, individual contract (see *Foster v. Albertsons,* page 84).

In another issue, the 1991 Legislature amended the statute granting immunity for legislative acts (2-9-111, MCA). The changes effectively removed the shield that protected school districts, many local government agencies, and the state legislature from wrongful discharge lawsuits. As a result, the precedent set in *Bieber* (see page 34), *Peterson* (see page 44), and other cases no longer applies. The Court affirmed the effect of the legislation in *Dagel v. City of Great Falls* (see page 76). (The amended law appears in the appendix.)

In 1999, the Supreme Court held that the Wrongful Discharge from Employment Act had "impliedly" repealed Montana's at-will statute (see *Whidden v. Nerison,* page 143). Following this decision, the 2001 Legislature explicitly repealed the statute and amended the language in the "purpose" section of the WDEA (39-2-902, MCA). Montana remains the only state with a comprehensive statutory remedy for wrongful discharge.

The WDEA does not apply to all discharges. It exempts any situation in which another legal remedy is available, such as a human rights complaint. It also exempts all employment covered by an individual contract for a specified term or by a collective bargaining agreement. Montana courts still deal with several types discharge cases that fall outside the ambit of the Wrongful Discharge from Employment Act.

This summary traces, in chronological order, the development of case law in the area of discharge from employment. (An index of cases, with citations and page numbers, starts on page 199.) Only Montana Supreme Court cases are presented here, plus a couple of Federal District Court cases; Montana District Court cases that have not been appealed follow the Supreme Court precedents.

Each case summary includes key words to describe the issues decided. For example, *due process* means the case involves a question of constitutional due process. Here are some, but not all, of the key words:

arbitration
at-will (employment)
collective bargaining agreement
constructive discharge
covenant (of good faith and fair dealing)
damages
default
discrimination
exemption
good cause
grievance
judicial review
legislative immunity
negligence
policy (of employer)
preemption
probation
procedure (court procedure)
public policy
§ 1983 (federal law 42 U.S.C. 1983)
statute
statute of limitations
tort
WDEA (Wrongful Discharge from Employment Act)

Be aware that several of the cases are *unpublished*. These are memorandum opinions that, under the Supreme Court's rules, may not be cited as precedent. Many of them are informative and present interesting questions. However, they are "non-cite opinions" included here only for informational purposes.

For further reading on many of the cases summarized here, consult these sources:

Bierman, L. and Youngblood, S.A. Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis. *53 Montana Law Review* 53–74 (1992)

Bierman, L., Vinton, K. & Youngblood, S.A. Survey: Montana's Wrongful Discharge from Employment Act: The Views of the Montana Bar. *54 Montana Law Review* 367-384 (1993)

Corbett, William L. Resolving Employee Discharge Disputes under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case. *66 Montana Law Review* 329-404 (2005)

Hopkins, S.A. & Robinson, D.C. Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future. *46 Montana Law Review* 1-24 (1985)

Hubble, J. Good Faith and Fair Dealing: An Analysis of Recent Cases. *54 Montana Law Review* 193–198 (1987)

Regan, M. Scott. *Tonack v. Montana Bank:* Preemption, Interpretation, and Older Employees under Montana's Wrongful Discharge from Employment Act. *56 Montana Law Review* 585–602 (1995)

Robinson, D. C. The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act. *57 Montana Law Review* 375–422 (1996)

Schramm, L.H. Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins. *51 Montana Law Review* 94–125 (1990)

EARLY DECISIONS — prior to *Gates*

Weir v. Ryan (1923) — ***contract*** *68 Mont. 336*

A married ranch hand had been hired at a rate of $75 a month. In offering the job by letter, the rancher had stated, "I think I can use you year-round." Six months later, the ranch hand was fired. In a lawsuit, the rancher claimed the employee did inferior work and knew little about irrigation. The ranch hand referred to the letter, saying that the phrase "year-round" established a contract for one year. The Court agreed: the letter was an oral contract obligating the rancher to employ the hand for one year. The Court held that, since the rancher had not shown that the employee's performance was, in fact, inferior, there was no cause for the discharge, so the contract was still in effect.

State ex rel. Nagle v. Sullivan, et al. (1935) — ***statute*** *98 Mont. 425, 40 P.2d 995*

Upon resignation of the governor, the lieutenant governor assumed office and soon dismissed the Fish & Game Commission so he could appoint his own choices. One member sued, claiming the governor could not remove him except for cause. The governor cited the statute which said a governor could remove a commission "for cause or for the good of the commission." The governor asserted that it was for the good of the commission for him to appoint his own choices. The Supreme Court disagreed, saying that the statutory phrase had to be taken as a whole, meaning a commissioner could be removed only for cause.

State ex rel. Opheim v. Fish and Game Commission (1958) — ***due process*** *133 Mont. 162, 323 P.2d 1116*

A Fish & Game biologist was summoned to a commission meeting, ostensibly to discuss one of the biologist's coworkers. Instead, the biologist himself was discharged by the commission without notice or hearing. After the biologist protested, a hearing was held some time later, and the commission upheld the discharge. The Court held that the biologist's due process rights were violated; by statute, the hearing should have been held prior to the discharge. The Court ordered the biologist reinstated and awarded costs of litigation.

State ex rel. Ford v. Fish and Game Commission (1966) — ***statute, due process*** *148 Mont. 151, 418 P.2d 300*

A game warden, hunting along the Montana-Idaho border, had taken a bighorn sheep. He had a Montana sheep permit, but Idaho charged he had taken the sheep in Idaho. The department director went to the commission, seeking direction on how to handle the controversy. The commission suggested the director get the warden to resign, and if that failed, to fire him. The director fired the warden after he refused to resign. After the discharge, the warden received a hearing before the commission, which upheld the discharge.

At issue in the subsequent lawsuit — who did the firing? One statute governed the director, stating that he could discharge an employee, and then grant a hearing if one were demanded. Another statute governed the commission, stating that it could discharge an employee only after a hearing had been held. The Court ruled that, since the director was acting at the behest of the commission, the commission had in fact fired the warden. The post facto hearing was thus a violation of due process under the second statute, and the warden was reinstated.

Weber v. Highway Commission of State of Montana (1971, federal) — ***due process, free speech*** *333 F. Supp. 561*

The plaintiff worked as a draftsman for the Highway Department for two and a half years. His performance had been criticized, but his performance appraisals contained satisfactory ratings. He co-wrote a let-

ter to the editor of the local newspaper; the letter was highly critical of the governor. Soon afterward, the department fired him, claiming that he had overstated his qualifications on his application form and had failed to divulge arrests he had had as a juvenile. The department did not grant a hearing on the discharge.

In the lawsuit, the federal district judge held that the commission had violated Weber's due process rights, since he was entitled to the job. The entitlement was not granted by virtue of initial employment or by state law. Rather, the department's regulations, which stipulated that discharge could only be for cause and after a hearing, created the entitlement. The judge described that entitlement in his opinion:

property right: "Where ... the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the 14th Amendment."

However, the judge held that the department had not infringed on Weber's right of free speech:

free speech: "The fact that the motive for the firing was generated by plaintiff's exercise of his first amendment rights does not ... prevent the Highway Department from dismissing him if a valid cause for the dismissal is shown. ... I think that the first amendment does not go far enough [that it will] protect a person who turns a spotlight on himself from the consequences of what is disclosed in the glare of that light." However, in a 1972 decision (*Perry v. Sindermann*), the U.S. Supreme Court held that a valuable government benefit (such as a job) may not be denied on a basis that infringes on one's constitutionally protected interests, especially one's interest in freedom of speech.

Ameline v. Pack & Co. (1971) — ***contract, good cause*** *157 Mont. 301, 485 P.2d 689*

This case involved an alleged agreement for William Ameline to be employed by Pack and Co. for a period of one year at a monthly salary. Ameline's employment as a paver-operator was terminated after seven months. The company said there was no more work and it could not afford to carry a crew through the winter. Ameline sued to recover the balance of the year's salary, plus damages for moving expenses and wrongful termination. The trial court found in his favor, awarding about $3900, plus interest, court costs, and attorney fees.

On appeal, the company said the employment "contract" was month-to-month, not for the year. In addition, it stated that the discharge was for a "good cause," introducing evidence of drinking, hangovers, and other matters. The Supreme Court found that there was credible evidence pointing to a contract for one year. And although there was evidence to support the good cause for termination, there was also conflicting evidence in the testimony of Ameline's supervisor, who stated Ameline did good work. The Court also noted that the "good cause" defense by Pack "was not made an issue except as an afterthought." In affirming the award to Ameline, the Court said, "The defendant [Pack] had the burden of proof to establish the cause for discharge, if any there was, and simply failed to do so."

Storch v. Board of Directors (1976) — ***probation, defamation*** *169 Mont. 176, 545 P.2d 644*

Storch was a newly hired counselor at a mental health center. As such, he was a probationary employee. A member of the board of the directors of the center felt that Storch's dress, hygiene, and cohabitation with his girlfriend were unbefitting a counselor. The member wrote a letter to the director, urging him to fire Storch. The director tried to get Storch to resign and, when that failed, discharged him. Storch filed suit, claiming defamation of character and invasion of privacy. District Court granted summary judgment for the board. The Supreme Court affirmed the judgment. Of importance is the Court's statement about probationary status:

probationary employee: "Finally, the facts stipulate that plaintiff was on probationary status. The purpose of such status is to provide a brief period in which to measure the employee's ability to perform the job be-

fore granting him a degree of job security. If the appropriate state employer feels that the employee is not measuring up during this probationary period, it can dismiss the employee without procedural due process."

This interpretation remains in effect to date.

Schend v. Thorson (1976) — ***probation, due process*** *170 Mont. 5, 549 P.2d 809*

Terry Schend was hired as a police officer in Whitefish on October 8, 1974. He was serving a six-month probationary period when he received notice in February 1976, that his employment would be terminated in March 1976. The letter from the mayor, John Thorson, contained reasons for the termination. Schend requested a hearing before the Whitefish Police Commission; his request was denied.

Schend then brought this suit, which District Court dismissed, leading to an appeal. The Supreme Court noted that the parties agreed that the law authorized "the removal of a probationary public employee or officer in a summary fashion, without necessity of cause or hearing." The sole issue, then, was whether due process was violated when the termination notice provided reasons and no opportunity to dispute the reasons was provided. The Court said no.

The Court referred to *Board of Regents v. Roth,* the 1972 US Supreme Court case that defined "property interest" to a government job and the need for due process. Under the *Roth* analysis, the Montana Court determined, "A probationary police officer under Montana law enjoys no property or vested right." Thus, no right of due process was violated.

In dissent, Justice Daly said the reasons in the letter constituted "charges" against Schend. Under Montana law, Daly argued, "the police commission shall hear, try, and decide all charges brought by any person against any member or officer of the police department." At stake, said Daly, was Schend's good name, reputation, and future employment.

Lindgren v. Board of Trustees (1976) — ***contract*** *171 Mont. 360, 558 P.2d 468*

Wesley Lindgren was a tenured teacher for fourteen years at Fergus County High School in Lewistown. In March 1973, he pled guilty to a third DUI offense. On condition of rehabilitation, which he satisfied, he was able to withdraw his plea and have the charges dismissed in 1975. In August 1973, the school board notified him of his termination for the DUI "conviction." Two hearings failed to resolve the issue.

The school board then amended its notice to include additional bases of dismissal. At a third hearing, Lindgren objected to this amendment and withdrew from the hearing when the board stuck by its second notice. The board then fired him. Lindgren then pursued a series of appeals that ended in a dismissal by the Supreme Court in 1974. This action sent the matter back to the County Superintendent of Schools, who upheld the dismissal. The State Superintendent affirmed that decision, as did District Court. Lindgren then ended up again before the Supreme Court.

The Court held that the initial cause of dismissal — the DUI charge — "failed to substantial any causal relationship between appellant's violations and his performance of teaching duties. ... Absent such showing, the discharge of [Lindgren] amounted to a breach of contract." With regard to the amended notice to Lindgren, the Court noted, "The additional charges ... are derived from information which was available to the trustees at the time of the drafting of the initial letter of dismissal ..." Were the Court to recognize the amended notice, it would place a prejudicial burden on Lindgren to disprove charges that were entered to remedy what was an inadequate charge in the first place. It reversed the District Court decision and sent the case back for determination of the appropriate remedy to Lindgren.

Swanson v. St. John's Lutheran Hospital (1979) — ***statute*** *182 Mont. 414, 597 P.2d 702*

Swanson was a nurse-anesthetist at the hospital. She had been scheduled to assist in a sterilization procedure — a tubal ligation — something she had done 20 times before. However, this time she refused. A "conscience statute" in Montana allows medical personnel to refuse to participate in abortions and sterilizations. Upon Swanson's refusal, the hospital fired her, giving her a "service letter" that stated she was discharged because of her refusal.

District Court upheld the firing, finding Swanson to be an employee "of questionable value" on other aspects of performance the hospital had brought up during the suit. The Supreme Court reversed. It said the conscience statute created public policy allowing such refusal to participate, and no reading of the statute could rule out such refusal even if the person had previously participated. Thus, Swanson could assert her right at any time. The Court also said the District Court had erred in considering other issues of performance; since the discharge letter had dealt only with Swanson's refusal, no other issues could be brought into the lawsuit.

Keneally v. Orgain (1980) — ***tort, public policy*** *186 Mont. 1, 606 P.2d 127*

The plaintiff worked for National Cash Register Company, starting as a salesman and eventually becoming account manager for a large region of the state. He frequently complained, verbally and in writing, to upper management about the company's poor service and maintenance of its products. Eventually, he was fired. He filed suit, stating a public policy claim that his discharge had been retaliation for his complaints. He also said the company was refusing to pay him commissions he had earned on sales prior to his discharge. The company responded that it fired Keneally for poor sales performance in his area. Further, NCR cited its policy to pay commissions on sales only upon installation. While Keneally had written some sales, he was fired before installation and thus would not receive the disputed commissions.

The Supreme Court upheld the discharge, stating that no public policy had been violated. That is, since the business practices of the company posed no peril to the public or misuse of public funds, such practices were the company's own business, and Keneally was not protected by the public policy exception to at-will status. Of importance, though, is that the Court cited *Monge v. Beebe Rubber Co.* (New Hampshire, 1974) and stated: "We do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee." The Court was thus willing to consider such a case, but found that this case did not meet the test of public policy violation. Regarding Keneally's commissions, the Court held that, since the discharge was proper, Keneally was not entitled to any commissions except those on installations in the two-week period between the notice of termination and its effective date.

Reiter v. Yellowstone County (1981) — ***due process*** *192 Mont. 194, 627 P.2d 845*

Reiter worked 18 years for the county, advancing to the position of night supervisor/custodian. One night, he fired one of the staff janitors. Reiter, in turn, was fired. The county administration then began to reconsider its action. At an informal meeting with Reiter, the termination was revoked and he was placed on suspension, pending a hearing. The county commission repeatedly delayed holding a hearing, but continued to promise one "soon." Eventually, the commission decided against a hearing and fired Reiter, sending him a letter stating the reasons — reasons that Reiter disputed.

Reiter filed suit against the county. He claimed that his 18 years of service entitled him to a due process hearing before he could be terminated. He also said the commission acted in bad faith by repeatedly promising a hearing but then reneging.

The Supreme Court upheld the discharge, saying that Reiter was an at-will employee under Montana law. The Court said no independent source could be found that established an entitlement to the job, so the at-will statute applied. The Court's opinion discussed current challenges to the at-will rule, but said, "While the rule may well be outdated, it is uniquely the province of the legislature to change it." Thus, Reiter had

no claim to due process. The Court rejected Reiter's claim that his length of service implied a contract and that such a contract implied a covenant of good faith and fair dealing. Without a "contract," there could be no "covenant." According to the Court, even if there were a covenant, the commission did not act in bad faith since, under the law, it did not owe Reiter due process. Although the commission had promised a hearing, it was not an enforceable promise.

Staudohar v. Anaconda Co. (1981, federal) — ***due process*** *527 F. Supp. 876*

This case, in federal court, dealt with a 35-year employee of the Anaconda Company. He had been a foreman for almost three years, and thus was not a member of the collective bargaining unit. Staudohar was fired for possession of company gasoline. He did not receive a hearing. The court upheld the discharge, saying there is no public policy violation when the discharge is for cause. The court rejected the employee's claim that he had an entitlement to the job and thus was owed due process:

property right: " ... it is the plaintiff's theory that after a lengthy period of employment an employee gains some kind of entitlement to a job which cannot be terminated for something less than good cause."

This is the same judge who had said, 10 years earlier in *Weber:* "Where ... the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the 14th Amendment."

At issue is whether there was any independent source that supported an entitlement. In *Weber*, the judge said the Highway Department's rules supported an entitlement. In the Anaconda company, the collective bargaining agreement might have supported an entitlement. But Staudohar did not fall under the union contract, so he could not claim any entitlement. And as a private sector employee, he was not protected by any statute or administrative rule. Thus, he was an at-will employee.

LATER DECISIONS — Gates and beyond

Gates v. Life of Montana Insurance Co. (1982, "Gates I") — ***tort, covenant*** *196 Mont. 178, 638 P.2d 1063*

Marlene Gates worked as a general receptionist and secretary for the insurance company. She had been employed about three and a half years. One day, the manager informed her that her work and attendance were unsatisfactory, and he gave her the option of resigning or being fired. She resigned. That evening, Gates had second thoughts about her action and called the manager, asking to rescind her decision. The manager agreed, saying he would return her letter of resignation. He didn't.

Gates filed suit. She introduced into evidence the company handbook. Among other issues, the handbook laid out possible reasons for discharge and stated that employees would be given notice of problems before any action would be taken. This, Gates said, established a contract for employment that was in effect until she was informed of problems and failed to correct them. She also claimed she had been pressured into resigning and sought damages for intentional infliction of emotional distress.

The company responded that Gates had resigned, so it was not liable for discharging her. In any case, she was an at-will employee and could be fired at any time. The handbook, said the company, was intended as general information, not a promise to which the company was bound. This was especially true since the handbook had been issued two years after Gates began her employment. District Court granted summary judgment to the company, and Gates appealed to the Supreme Court.

The Court rejected Gates's claim that the company had breached her employment contract:

"The employee handbook was not a part of Gates' employment contract at the time she was hired, nor could it have been a modification to her contract because there was no new and independent consideration for its terms. An employee handbook distributed after the employee is hired does not become part of that employee's contract. Therefore the handbook requirement of notice prior to termination is not enforceable as a contract right."

However, the Court did recognize that there was an employment contract, even though it was an at-will situation.

"Gates next contends that her employer owed her a duty to act in good faith with respect to her discharge. The doctrine of implied covenant of good faith in employment contracts has been neither adopted nor rejected by this Court, although it was discussed in *Reiter v. Yellowstone County*... In *Reiter we* did not reach or decide the issue presented here.

"The circumstances of this case are that the employee entered into an employment contract terminable at the will of either party at any time. The employer later promulgated a hand-book of personnel policies establishing certain procedures with regard to terminations. The employer need not have done so, but presumably sought to secure an orderly, cooperative, and loyal work force by establishing uniform policies. The employee, having faith that she would be treated fairly, then developed the peace of mind associated with job security. If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done."

"... a covenant of good faith and fair dealing was implied in the employment contract."

With this conclusion, the Court adopted for the first time the implied covenant in employment situations. However, it rejected a tort of wrongful discharge, because there was no public policy violation. In reversing the District Court's summary judgment, the Supreme Court sent the case back for trial on the facts. It would be up to a jury to decide if the company had breached the covenant of good faith and fair dealing.

Nye v. Department of Livestock (1982) — ***tort, public policy*** *196 Mont. 222, 639 P.2d 498*

Margaret Nye began her employment as a permit clerk with the Department of Livestock. She performed well on the job, passing her probation and achieving permanent status. After a year and a half, she was promoted to general office clerk and placed on a six-month probationary period in the new job. Within four months, Nye was informed that her performance was inadequate. She was given a 10-day warning notice telling her that the deficiencies had to be corrected. At the end of the 10 days, Nye's supervisor determined her work was still deficient and fired her.

Nye filed a grievance within the department. The grievance committee conducted a hearing and determined that she had received inadequate training and supervision, and had not been treated in "total fairness." The committee recommended that Nye be promised a job on the level of either of the two she had held within the department. After reviewing the committee's recommendations, the department director decided to sustain Nye's discharge. Nye filed suit, seeking judicial review of the director's decision and asking damages for wrongful discharge. District Court granted summary judgment to the department, and Nye appealed to the Supreme Court.

The Court rejected Nye's claim for judicial review, saying hers was not a contested case, since a hearing was not required by statute. However, the Court ruled that Nye could assert a claim that she had been wrongfully discharged: "Administrative rules may be the source of a public policy which would support a claim of wrongful discharge." "We find that the Department of Livestock failed to apply its own regulations to Margaret Nye, and thereby violated public policy."

The Court said that Nye had been properly terminated from her new position. "However, the same procedures were not applied to the permit clerk position in which Nye had achieved permanent status. ... Before the Department could remove Nye from the permit clear position [the old job] in which she had permanent status, the Department had the obligation to follow the public policy expressed in its own regulations.

"There was no showing of 'just cause' for removing Nye from her permanent status in the permit clerk position. She was entitled to proper termination from her permanent position." In this case, the Court recognized the tort of wrongful discharge in Montana, based on a violation of public policy.

*Leyland v. Heywood (1982) — **due process** 197 Mont. 491, 643 P.2d 578*

Leyland was a nontenured professor at Eastern Montana College. He applied for tenure, and it was denied. The college then offered him a terminal contract, meaning he could teach for one more year. He requested a hearing and statement of reasons why he had been denied tenure. He also requested an extension of the deadline to sign the terminal contract until the tenure issue was settled. The college denied a deadline extension, denied the hearing, and since Leyland did not sign the terminal contract before the deadline, he had no job.

Leyland sued, claiming he was entitled to the hearing. To support his case, he cited comments the college president had made to a faculty meeting. The president had said he supported the faculty and hoped that everyone felt secure in their employment at EMC. Leyland claimed these comments supplemented his employment contract, giving him the expectation of continued employment.

The Court ruled that, as a nontenured teacher, Leyland had no vested right to the job, and therefore was not entitled to a hearing. The Court also said that the "general comments" of the president did not supplement the employment contract. In the court's view, Leyland was "simply a nontenured teacher who was not retained."

*Lovell v. Wolf (1982) — **due process** 197 Mont. 443, 643 P.2d 569*

Helen Lovell had been elected to three 4-year terms as clerk and recorder of Deer Lodge County. Her last term was to expire in January 1979, but in May 1977, a city-county charter was put into place. In the reorganization, the County Commission changed the clerk and recorder position from an elected to an appointed office. Joseph Wolf was appointed manager of Anaconda-Deer Lodge County in July 1977. Six months later, he told Lovell that she was to help another woman in the clerk and recorder's office. Although there was some confusion at the time, Wolf apparently appointed the woman as clerk and recorder, demoting Lovell to assistant.

In mid-February and mid-March, Wolf spoke with Lovell, "suggesting" she retire. When Lovell resisted, Wolf told her the work was unsatisfactory and that she was fired as of March 17, 1978. Lovell filed suit, seeking reinstatement to her position and back pay on the grounds that she had been improperly discharged. The District Court denied her petition.

On appeal, the Supreme Court recognized "due process is the pivotal issue presented in this appeal." At the time of the changeover to a county charter, the County Commission had directed the adoption of a personnel system; this had not taken place within the specified time. The Court found that "[f]rom the city-county manager's first transfer of [Lovell's] duties to the final termination of her employment, [her] rights under the charter were neither recognized or protected." As elected clerk and recorder, Lovell had been general supervisor, not performing any of the specific jobs that required specific skills. Following her transfer to records clerk, she was called on to do technical jobs for which she had no expertise. Before terminating Lovell's employment, Wolf criticized the quality of her work. "However, the record is also clear that Wolf did not call this to her attention until the day he notified her that she was no longer employed, nor was any effort made to train her for the skills necessary to stay on the job."

The Court referred to the *Reiter* case (see page 6) to point out that "to claim due process protection, an employee must be able to point to an independent source" that shows a property interest in the job. In this case, the Court said, there were three, primary among them the county charter. The Court reversed the District Court judgment and sent the case back, instructing that Lovell be reinstated to her position as clerk and recorder, be given back-pay from the date of termination (a five-year span), and that hearings be held to determine her future status as an employee.

Como v. Rhines (1982) — ***contract*** *198 Mont. 279, 645 P.2d 948*

This was a contract case arising in Missoula. Gary Como was an accountant living in St. Paul and seeking work in western Montana. In April 1978, he traveled to Missoula and met with Jim Rhines, president of Sound West, Inc. After two interviews, Rhines and Como had agreed on compensation, benefits, and duties of the job. Payment of moving expenses was included in the agreement.

In early June, Como and his family moved to Missoula. On June 9, 1978, Como went to Sound West and told Rhines he still needed to work out housing arrangements. Rhines told him to do what was necessary and report to work later in the month. Around June 21, Como asked for a starting date. Sound West sidestepped the issue. When Como submitted a list of moving expenses, Rhines refused to pay them. Finally, around the end of June, Rhines told Como there wasn't a job for him.

Como's lawsuit was successful: District Court found that a contract had been struck and that Rhines and Sound West had breached it. The Supreme Court agreed, but found some errors in the determination of damages to be paid to Como. The Court remanded with instructions on determining damages. Sound West had also appealed the fact that Jim Rhines had been found personally liable for the breach of contract. The Court found that the "rule of agency" generally protects corporate agents from liability, but that Rhines had not identified himself as an "agent" of Sound West sufficiently to enjoy the immunity. Thus, he was held personally liable.

Small v. McRae (1982) — ***due process, defamation*** *200 Mont. 497, 651 P.2d 982*

This is an interesting case involving the removal of Aaron Small from the chairmanship of the English Department at Eastern Montana College. Robert McRae, as Dean of the school of liberal arts, terminated Small's chairmanship and notified him and other departments by memorandum. The memo spelled out reasons the action was being taken. By the time the dust had settled, Small had filed a five-count claim against McRae, essentially boiling down to two allegations: 1) Small had been deprived of due process in the removal from the chair, and 2) McRae had libeled Small with the memo. District Court granted summary judgment to McRae, and Small appealed.

The Supreme Court affirmed the summary judgment. The conclusions are briefly stated here; the path to those conclusions is a winding one, tracing constitutional law and judicial precedent. On the due process issue, the Court noted that Small belonged to a collective bargaining unit, and the collective bargaining agreement contained a grievance and arbitration procedure. Small had not used that procedure, electing instead to sue McRae. The Court, however, held that the grievance procedure would have provided adequate due process protection, had Small chosen to grieve. Since he did not, he could not claim deprivation of due process.

On the issue of libel, the Court relied on the *Storch* case (see page 5) in holding that, under statute, the memorandum was an absolutely privileged communication conducted in the official discharge of McRae's duties as Dean. Under this privilege, by definition, there could be no libel.

Gates v. Life of Montana Insurance Company (1983, "Gates II") — ***tort, damages***
205 Mont. 304, 668 P.2d 213

After the Gates case was sent back for trial, the jury found in her favor and awarded her $1891 in compensatory damages and $50,000 in punitive damages. The District Court judge entered a judgment n.o.v. (notwithstanding the verdict), saying that punitive damages could not be awarded. On this issue, Gates appealed again to the Supreme Court.

The Supreme Court referred to the statute stating when punitive damages could be awarded in cases of fraud, oppression, or malice (27-1-221, MCA) and established a relationship with the covenant of good faith and fair dealing: "Breach of the duty to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered ..." The Court found that the jury had reason to find that such fraud, oppression, or malice had occurred. Thus the Court, by a four-to-three majority, ordered the punitive damages restored.

Owens v. Parker Drilling Co. (1984) — ***discrimination, damages*** *207 Mont. 446, 676 P.2d 162*

William Owens went to work for as a roughneck for an oil drilling company. However, four days later, he was fired. Owens had lost an arm in a childhood accident. The company told him that, as a matter of safety, they simply could not employ a one-armed man. Owens pleaded for a chance, pointing to past experience in the same line of work and stating his performance had been satisfactory — even commendable. Sorry, the company said, rules are rules. Sorry, Owens said, I'll see you in court.

In his lawsuit, Owens charged that the company had discriminated against him on the basis of his handicap, violating state law. He further sought punitive damages, saying the company had recklessly disregarded his claims of competence and refused to test his ability. The company responded that its policies explicitly forbade employing workers who were missing an eye, an arm, a leg, a foot, or had other such handicaps that posed a reasonable danger to the worker himself or other employees. Citing the hazardous nature of oil-drilling work, the company claimed it had established a bona fide occupational qualification that excluded Owens from the job. District Court granted partial summary judgment to the employer, ruling out any punitive damages.

On appeal to the Supreme Court, Owens argued that the discrimination against him was bad enough to warrant punitive damages. The Court disagreed: "The mere fact that the conduct on which the lawsuit is based is unlawful should not in and of itself authorize a recover [sic] of punitive damages." The plaintiff must also prove some malice or recklessness on the part of the employer. The Court did say, though, that malice could sometimes be presumed from violation of a statute. In considering the issue, the Court found:

> "Much confusion has been generated by inconsistent use of loosely defined terms such as willfulness, wantonness, recklessness, gross negligence, and unjustifiable conduct. To avoid future confusion it is necessary to adopt a carefully defined standard of conduct and prescribe its legal significance. We adopt this standard for presumed malice:
>
> "When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice."

The Court then looked at the Human Rights Act (Title 49, MCA) and found that "[v]iolation of this statute warrants a claim for punitive damages if such violation is shown to be intentional or reckless." Given the facts that Owens could do the job safely, had done it before, that Parker Drilling made no investigation in-

to Owens's ability and gave no specific facts to show that Owens would be unsafe, the Court said a case could be made that the company was reckless. It was a question to be decided by a jury.

On the matter of whether a jury should judge whether the company was reckless, the Court showed a vigorous defense of that role: "There are those who distrust the lay person's capacity for reasoned and dispassionate judgment. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process."

Bridger Education Association v. Board of Trustees (1984) — **statute** *209 Mont. 31, 678 P.2d 659*

The Board of Trustees had not renewed the contract of a nontenured teacher. The teacher asked for a statement of reasons and was told "we think we can find a better teacher." The Supreme Court found this statement to be insufficient under the law (§ 20-4-206, MCA) that requires a school board to provide, on demand, a statement of reasons for nonrenewal. The Court interpreted the law to mean specific, objective reasons regarding performance or conduct.

A similar statute (§ 39-2-802, MCA) exists for all employers. Thus, if a discharged employee demands it, the employer must give a letter stating specific reasons for the dismissal. It is a good practice to do so even if the employee does not demand it.

Dare v. Montana Petroleum Marketing Co. (1984) — **tort, covenant** *212 Mont. 274, 687 P.2d 1015*

In this case, the Montana Supreme Court significantly expanded its recognition of the covenant of good faith and fair dealing. Jacqueline Dare worked for six months as a cashier and station attendant at a Husky station, owned by Montana Petroleum Marketing Company. One winter's day, she fell in her yard when coming home from work. She went to the hospital and was given a neck brace to wear. The next day, she tried to get a coworker to work her shift for her, but the other person couldn't help out. Dare went to work. Three hours later, she called the station manager, saying she wasn't sure she could complete her shift. The manager told her to try. Dare took some pain pills and threw up in a garbage can. A customer called the manager to tell him about Dare's condition. The manager called Dare back and said he would come in to work for her and that she was fired.

Dare filed suit against the company. The manager alleged her performance was substandard and that he had warned her on several occasions about specific issues of performance and conduct. Dare disputed the manager's statements, saying that the "warnings" were general statements made to all employees. She admitted that the manager had once told her to improve her performance or be fired, but she also claimed the manager had later told her several times that she was doing an excellent job. District Court granted summary judgment to the company on two grounds: there was no public policy violation in the discharge, and no covenant of good faith and fair dealing could be implied because the employer had no handbook outlining a discharge procedure, as in the *Gates* case (see page 7).

The Supreme Court reversed the judgment. On the issue of public policy, the District Court had said no law or administrative rules had been ignored or misapplied. The Supreme Court held that "[p]ublic policy violations may conceivably arise on other facts or theories" and that Dare was entitled to develop her argument.

More importantly, the Court dealt at length with the covenant of good faith and fair dealing. The Court held that "an employment handbook as promulgated by the employer in *Gates* is not essential in a cause of action for breach of the implied covenant of good faith and fair dealing. Implication of the covenant depends on existence of **objective manifestations** by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly." (emphasis added)

The Court found evidence of such "objective manifestations": 1) Dare had been given a pay raise and insurance benefits after three months of employment, and she had been promised another raise; 2) Dare said the manager had told her wanted her to learn to do the station's bookkeeping; 3) the company had a written policy that an employee who showed independence and initiative would "most likely have a station of his own in the not too distant future." Although the company denied the Dare had any basis to believe she had job security, the Court held that these objective manifestations were sufficient "issues of material fact" to warrant a trial before a jury.

In a special concurring opinion, Justice Morrison argued even more strongly for the covenant of good faith and fair dealing while defining the at-will statute: "First, it should be made clear that this Court has not modified the 'at will' statute. Courts cannot amend statutes."

However, Morrison wrote,

> "[t]he statue refers to the term of employment but has nothing to do with the obligations owed by either party to the other. In other words, even though employment may be terminated at will, if a legal obligation is breached, that breach may give rise to separate tort action.
>
> "The covenant of good faith and fair dealing is implicit in every employment contract irrespective of a reasonable belief regarding job security. The law imposes an absolute obligation upon employers to deal fairly and in good faith with their employees from the commencement of the employment relationship.
>
> "An employer, under the 'at will' statute, has the right to terminate. However, if the employer violates the legal obligation to treat the employee fairly and in good faith, then separate and independent tort action can be instituted by the injured employee against the offending employer. Damages, not reinstatement, is the remedy."

Morrison also argued that the definition of wrongful discharge as a public policy violation was dead. When the Court, in Gates II, recognized the tort of breach of the covenant, the "new" tort subsumed the "old" tort. "All public policy violations would undoubtedly involve a breach of covenant of good faith and fair dealing." Keep in mind, though, that Morrison's opinion did not reflect the majority view of the Court.

European Health Spa v. Montana Human Rights Commission (1984) — ***discrimination***
212 Mont. 319, 687 P.2d 1029

This case involved a charge of marital discrimination. Documentation played a key role, but not in favor of the employer. Violet Haddow worked for the health spa as a membership salesperson. Her husband was the spa manager. While Violet was on vacation, her husband was fired for fiscal hanky-panky. Violet came into the spa two days later and created quite a commotion, saying they were going to sue the spa and leveling accusations at the ownership. At that time, she was called on the carpet and fired.

Haddow filed a marital discrimination complaint with the Human Rights Commission (HRC). In hearing, the spa claimed Haddow knew of her husband's activities, that she failed her duties as assistant manager, that she fell behind in sales, and that she was grossly insubordinate at the spa on the day she was fired. Haddow responded with her excellent sales record, a document contradicting that she was ever assistant manager, and a termination notice that showed the same dates of preparation and effect as her husband's notice.

The hearings officer found for Haddow. In a full hearing before the HRC, the Commission also found for Haddow and increased the award to $7,500 back pay. The spa sued the HRC. District Court sent the case back to the HRC, saying the Commission had not sufficiently reviewed the record before increasing the

award. The HRC reconsidered the case, reviewed the record, and kept the same award. The case returned to District Court, which affirmed the award and tacked on attorney's fees.

The spa appealed to the Supreme Court, which affirmed the District Court decision. In the matter of the discharge, the Court commented that although Haddow had done actions that might have led to a legitimate discharge for cause (her insubordination), these occurred after the spa had already decided to fire her. Therefore, the spa's allegations against Haddow did not belong on the record. Haddow was fired because she was married to the fired manager, and this constituted marital discrimination. The Court charged that the spa did not follow the law or its own policy.

Welsh v. City of Great Falls (1984) — ***due process*** *212 Mont. 403, 690 P.2d 406*

Dennis Welsh, a fire captain for the City of Great Falls, was unable to continue in his job because of poor health. After three informal meetings with the fire chief, he was discharged. He filed suit against the city, claiming that due process required the city to provide a hearing before he was discharged. The city claimed the Welsh voluntarily retired. Even if he were discharged, said the city, no hearing need be offered in the case of physical disability. And even if a hearing were required, the city maintained that the meetings with the fire chief and the offer of an exit interview with the city personnel officer fulfilled the requirement.

At issue were the statutes governing firefighters. MCA 7-33-4122 provides for the appointment of a firefighter and states that he shall hold the job during good behavior and as long as he is physically able to do the job. MCA 7-33-4123 authorizes the fire chief to suspend a firefighter for neglect of duty or violation of rules. MCA 7-33-4124 outlines the hearing procedure to be followed in cases of suspension.

The Supreme Court held that "this statute provides no hearing remedy for one who is terminated for physical disability. Reading the three statutes together, as we must, they apply only to situations where neglect of duty or violation of rules is the alleged reason for termination. However, notwithstanding the statutory deficiency, we hold that section 7-33-4122 creates a property interest ... and therefore Welsh could not be terminated without first being given the opportunity for a hearing before an impartial tribunal."

After this finding, the Court ruled that "[t]he argument that the meetings between Welsh and the fire chief and operations officer satisfied the hearings requirement cannot be taken seriously." The Court voided Welsh's termination and ordered full pay and benefits from the time of termination until final disposition of the case. It also ordered the city to afford Welsh his hearing. Thus the Court, by a four-to-three majority, reaffirmed the due process rights of persons who hold a property interest in a job. In this case, the Court said the specific law required a hearing before termination, even while it said the hearing procedure stated in the law did not apply to physical disability. In dissent, Justice Weber stated that a hearing after the termination would have satisfied Welsh's constitutional right to due process.

Crenshaw v. Bozeman Deaconess Hospital (1984) — ***tort, covenant, probation***
213 Mont. 480, 693 P.2d 487

In this important case, the Supreme Court further expanded the covenant of good faith and fair dealing. Shirley Crenshaw had worked as a respiratory therapist with an independent company that contracted its services to the hospital. The hospital purchased the company and hired Crenshaw as a respiratory therapist. The hospital's policy provided for a 500-hour probationary period for new employees. At the time of Crenshaw's discharge, she was still in probationary status.

The discharge came about on a complaint from three intensive-care nurses. Following a meeting between the nurses and hospital officials, a discharge memo was written. It charged Crenshaw with insubordination, disrupting the continuity of care, continually getting in the way of patient care, disorderly conduct, unsatisfactory work performance, violation of safety and health rules, and breach of confidentiality. Sub-

sequently, Crenshaw met with the hospital administrator to discuss the matter. The administrator then interviewed persons present during the events that lead to the charges. The administrator finalized the firing. After her discharge, Crenshaw tried to get unemployment insurance benefits. The hospital told Job Service she had been discharged for unsatisfactory work performance and endangering patient well-being. Thus, Crenshaw was unable to find work in the Bozeman medical community.

Crenshaw filed a lawsuit and, in trial, disputed the charges the hospital had made. She introduced evidence to show that the charges were false, and that the administrator had failed to interview key witnesses to the events that led to her discharge. She alleged the hospital had removed a certificate from her personnel file. She also called an expert witness to testify on the breach of the covenant of good faith and fair dealing. The jury found for Crenshaw, awarding $125,000 compensatory damages and $25,000 punitive damages. The hospital appealed to the Supreme Court on four issues: 1) whether an at-will probationary employee is covered by the covenant of good faith and fair dealing, 2) whether the record sustained a separate action based on negligence, 3) whether the expert witness's testimony was admissible, and 4) whether the award of punitive damages was proper.

The Court held that "even in probationary employment relationships, the employer still owes his employee a duty of good faith and fair dealing." However, the Court also referred to *Dare* (see page 12) and said there were "objective manifestations" that led Crenshaw to believe her job was secure: 1) all of her contracted work had been at the hospital, 2) the hospital provided her with health insurance and a medical discount — benefits it extended only to permanent employees, 3) the hospital made no reference to her probationary status in its discharge memo or the administrator's discharge letter.

The question then arises, does the Court consider all employees to be covered by the covenant (as Justice Morrison argued in his opinion in *Dare),* or only those employees who can show objective manifestations that lead them to believe their jobs are secure? In *Storch* (see page 5), the Court agreed that probation is a period for evaluating an employee before granting job security. Thus, even though Crenshaw's case showed objective manifestations, the Court seems to say that these are not necessary:

> "We hold that the 'at-will' statute is very much alive. ... There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw even as a probationary employee was owed a duty of good faith. This requirement of good faith and fair dealing does not conflict with [the law], but merely supplements it. Employers can still terminate untenured employees at-will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages. The Hospital's notification to the Bozeman Job Service of Crenshaw's unsatisfactory work performances deprived her of employment in the local medical community. This was an act of bad faith. The charges and allegations in the discharge memorandum were false. The charges were serious and resulted in Crenshaw losing her employment as well as jeopardizing her career. This was an act of bad faith. The record shows that Crenshaw's discharge was motivated by bad faith and warrants recovery for breach of implied covenant of good faith and fair dealing ... ."

On the issue of negligence, the Supreme Court agreed with the District Court's finding. The hospital's failure to properly investigate its charges against Crenshaw constituted negligence. The Court also allowed the testimony of the expert witness to remain on the record. The Court acknowledged that the covenant is a complex issue. "[Dr. Vinton's] testimony assisted the trier of fact by providing the jury with information and a perspective beyond the common experience of a lay juror."

Finally, on the issue of punitive damages, the hospital noted that Crenshaw's discharge happened in the period between the two *Gates* decisions. The first decision affirmed the covenant of good faith and fair dealing, but it wasn't until the second *Gates* decision (after Crenshaw was fired) that the Supreme Court upheld punitive damages for breach of the covenant. Thus, the hospital argued it had not been "put on notice" that its actions may make it liable for damages. The Court disagreed, saying the first *Gates* decision put the hospital on notice to deal fairly and in good faith, and that the hospital's negligence was another basis for punitive damages.

Conboy v. State of Montana and Harrison (1985) — ***discrimination*** *214 Mont. 492, 693 P.2d 547*

Richard Conboy served in the capacity of Deputy Clerk of the Supreme Court for 20 years. In 1982, he ran for Supreme Court Clerk, an elective office. He lost the race to Ethel Harrison, who appointed a woman younger than Conboy to the Deputy Clerk office. When Harrison took office, she removed Conboy from the payroll.

Conboy filed suit, claiming Harrison had discriminated against him on the basis of sex, age, and political beliefs. District Court dismissed the case through summary judgment. Conboy appealed to the Supreme Court, which affirmed the District Court decision.

For one thing, the Court said, Conboy had never been appointed in writing to the Deputy Clerk position, as required by law, and he had never taken an oath of office, also required by law. Thus, the Deputy Clerk office had been legally vacant for 20 years; Conboy had merely been acting in the capacity as a "de facto public officer." When Harrison legally appointed the new clerk, his employment ended. The Court held that, since Conboy did not hold public office under a valid appointment, his removal from office was not a question for the Court to decide.

On the discrimination matter, the Court noted that the only evidence Conboy submitted was his own allegations. When Harrison filed a motion asking summary judgment, Conboy introduced no other evidence to support his claim of discrimination. Thus, by the rules of civil procedure, the District Court's grant of summary judgment was proper. The Supreme Court concluded, "In the absence of a factual showing of discrimination, we do not rule upon whether it may be unlawful for an elected public officer to discriminate on the basis of sex, age or political affiliation in the discharge or appointment of a deputy."

Poor Richard got no relief.

Raynes v. City of Great Falls and Johnson (1985) — ***statute*** *215 Mont. 114, 696 P.2d 423*

In this declaratory judgment action, the Supreme Court affirmed that the City Manager, not the Mayor, has authority to affirm, modify, or veto decisions of the Police Commission. The case is separate from, but related to, judicial review of the actual termination (see next case).

After a hearing, the Great Falls Police Commission recommended discharge for Sgt. William Raynes. The City Manager confirmed the recommendation and discharged Raynes. A couple days later, the Mayor of Great Falls, a member of the elected City Commission, entered her own order. The Mayor modified the recommendation of the Police Commission, directing that Raynes stay on as police officer. The City then filed this declaratory action to straighten things out.

Recognizing the City's commission-manager form of the government, the Court said state statutes "narrowly define and limit the role of mayor." The City Manager is the chief executive, with "broad and pervasive" authority. Some statutes used the term "mayor" with regard to decisions of the Police Commission. "However, under the commissioner-manager form of government, the term 'mayor' as used in the statutes means the city manager." The Mayor's modification of the Police Commission was invalid.

Raynes also pressed an issue of due process. The Court put no stock in his argument, saying the "constitutional claim was not properly before the court in this declaratory judgment action." Such an action should determine the meaning of a law and adjudicate the rights of parties, "but not ... determine controversial issues of fact."

Justice Morrison specially concurred, joined by Justice Weber. He disputed the majority's holding with regard to declaratory judgments. They can address constitutional questions, and they can address contro-

versial issues of fact. And anyway, "due process is a question of law, not a question of fact." Having said that, Morrison concluded, "I believe that the procedural due process rights of the plaintiff were afforded in this case and therefore I concur in the result."

In the Matter of Raynes (1985) — ***due process*** *215 Mont. 484, 698 P.2d 856*

In this judicial review of the decision to discharge a police officer, the Supreme Court affirmed.

William Raynes worked 18 years for the Great Falls Police Department, advancing to the rank of sergeant. By all accounts, he was "fine officer" with "exemplary service." In service to the department and on his own, he became interested in hypnosis. As his interest and training grew, he decided to set up a private practice offering hypnosis therapy. He cleared this moonlighting with the police department.

Rumors and complaints about his activities as a hypnotist prompted the department to investigate. The investigation uncovered evidence that Raynes was making sexual advances and having sex with some of the women he was treating. The department filed a complaint with the Police Commission, charging Raynes with conduct unbecoming an officer and conduct that brought reproach upon the police force.

After a hearing, the Police Commission found that substantial evidence supported the charges. The fact that the conduct occurred off-duty did not excuse it. Raynes had signed the Law Enforcement Code of Ethics, agreeing to keep his private life "unsoiled." In providing hypnosis, he had told some of the women he was a police officer, apparently to boost their trust in him. The Commission also found that the compelling interest in protecting the public outweighed Raynes's right of privacy regarding his off-duty activity. The Commission recommended discharge, which the City Manager confirmed. Raynes filed for judicial review, and District Court affirmed, leading to this appeal.

The Supreme Court addressed three issues. First, Raynes contended that a new hearing was in order to allow him further discovery and more witnesses. Regarding discovery, Raynes had tried to get information on police disciplinary actions over the prior ten years. The Court said that was irrelevant: "A review of the pertinent precedent shows that past conduct or action is never admissible as relevant in a case regarding a specific charge."

Raynes also argued that the absence of criminal charges meant the sex was consensual, and he couldn't be fired for that. The Court noted that "this is not a case that involves a question of private sexual practices or mores." It involved "an advertised business" where Raynes "traded on his position as a police officer." He further invoked his right of privacy; the Court affirmed the compelling state interest in protecting the public and preserving the integrity of the Police Department.

Second, Raynes argued that the City hadn't proven it charges against him. District Court had affirmed the Police Commission's findings of fact and conclusions of law. The Supreme Court did, too. Third, Raynes said discharge was "excessive punishment." Given that nature of his conduct, the Court affirmed the Police Commission and District Court.

Wilkerson v. School District No. 15, Glacier County (1985) — ***contract*** *216 Mont. 203, 700 P.2d 617*

Pat Wilkerson, a single mother, signed a contract as a bus driver for the school district. At the time, she was tending bar in the evenings. She agreed to quit the bartending job when she received her first paycheck from the district. She started driving in late August 1983 and kept tending bar, planning to quit in late September when she got her monthly paycheck. Five days before payday, her supervisor fired her because she was still tending bar. He had previously told her, "I don't feel a Christian should be working in a bar."

Wilkerson sued the district and a jury found in her favor, awarding damages amounting to the remainder of her contract. However, the district judge granted the district's motion for a judgment notwithstanding the verdict. Wilkerson appealed.

The Supreme Court first looked at whether discussions between Wilkerson and the district before she signed the contract varied the terms of the contract. "Our review of the contract discloses that there is no mention whatsoever in it of Wilkerson not holding a second job, or relinquishing one already held ... There is nothing in the contract which suggests an intent to incorporate the conversation. Thus, the jury was free to conclude that that discussion did not vary the contract."

A second issue was whether quitting the bartending job was Wilkerson's duty before starting the new job. The contract had no express condition about it. Whether such a condition was implied cut to the basic dispute between Wilkerson and the district. "Such conflicts in the evidence," said the Court, "were for the trier of fact to resolve, and it did resolve them, in favor of Wilkerson." On these grounds, District Court's judgment notwithstanding the verdict was improper: "Because there was ample evidence upon which he jury could render its verdict, the District Court should have deferred to that verdict. It should not have set aside the verdict solely because it chose to believe testimony different from that believed by the jury."

Pryor School District v. Supt. of Public Instruction, et al. (1985) — ***due process***
218 Mont. 73, 707 P.2d 1094

A nontenured school principal in Pryor was discharged on four counts of misconduct. He appealed the action to the Big Horn County Superintendent of Schools. The superintendent held a hearing and found that the discharge had not been for cause. The superintendent ordered the school district to reinstate the principal and compensate him for lost salary.

The school district appealed that decision to the state Superintendent of Public Instruction. At that time, the district tried to introduce new affidavits into the record. The state superintendent disallowed the new evidence. He said the evidence in the hearing at the county level had been sufficient, and besides, the new affidavits were sloppy — with passages whited out, pasted over, and handwritten on. He upheld the county superintendent's decision.

The school district sued the state superintendent, saying that he should have allowed the affidavits to be entered into the record. District Court agreed with the superintendent, so the school district appealed to the Supreme Court. The Supreme Court affirmed the District Court decision, saying that the county hearing was sufficiently thorough, and the new evidence would add nothing to the case.

Flanigan v. Prudential Savings and Loan Association (1986) — ***tort, covenant, damages***
221 Mont. 419, 920 P.2d 257

In this decision, the Supreme Court reaffirmed many of the decisions already discussed. Mildred Flanigan worked for Prudential for 28 years in various positions; her performance was satisfactory throughout her career. She had reached the position of assistant loan counselor, but that job was to be eliminated in a reduction in work force. Prudential offered her a chance to attend a week-long teller training program in Salt Lake City. She accepted, and after returning from training, she began work as a teller. About three weeks later, she was discharged without notice or a hearing.

Within two weeks, Flanigan filed an age discrimination complaint with the Human Rights Commission. While that action was pending, Prudential offered Flanigan a part-time teller position, 14 months after they had fired her. She turned the job down. The HRC did not act on her complaint, but issued a "right to sue" letter. Flanigan filed suit in April 1983 — three years after her discharge.

The jury in District Court decided in favor of Flanigan. It awarded $94,000 in compensation, $100,000 for emotional distress, and $1,300,000 in punitive damages. Prudential appealed to the Supreme Court, which

found six issues to decide: 1) was there enough evidence to justify submitting Flanigan's breach of covenant case to a jury? 2) was negligence an admissible charge against Prudential? 3) was it proper to admit the testimony of an expert witness? 4) should Prudential have been allowed to introduce "after-acquired" evidence into the trial? 5) should the back wages award have been reduced, since Flanigan turned down the part-time teller position? 6) was there enough evidence to allow the jury to award punitive damages, and were the damages excessive?

In trial, Prudential had given conflicting reasons for Flanigan's discharge. At first, the manager testified she was laid off in a RIF. Later, he said she was fired for poor performance. He also testified that any errors she made as a teller did not warrant discharge. The manager admitted that Flanigan was never warned, reprimanded, or counseled about her performance, although Prudential's policies require such actions before termination. Prudential supervisors testified that most new tellers require two to six months to become proficient, yet Flanigan was fired after three weeks.

The Court's opinion discussed at length the covenant of good faith and fair dealing, relying on the *Dare* case (see page 12) as precedent. The Court concluded, "The covenant, in a long-term employment situation, only requires the employer to have a fair and honest reason for termination ... From the evidence presented, the jury could have found that appellants had no fair and honest cause for discharge and, in fact, had ulterior motives." On this basis, Flanigan had a good case for wrongful discharge.

On the negligence issue, the Court referred to *Crenshaw* (see page 14) as precedent and allowed the finding to stand. In Flanigan's case, Prudential committed 13 violations of its own policies, including failure to review Flanigan's prior work history and performance before deciding to discharge her. Also relying on *Crenshaw* as precedent, the Court allowed the testimony of an expert witness to remain on the record, in answer to the third issue above.

The fourth issue concerned an attempt by Prudential to introduce into the trial a summary of teller transactions from a few of the days that Flanigan worked as a teller. Prudential said the summary provided evidence of Flanigan's poor performance. However, the summary was not known to Prudential prior to Flanigan's discharge and could not have been used as a basis for the decision to fire her. As such, it was evidence acquired "after the fact," and based on the *Swanson* precedent (see page 6), the summary was inadmissible.

The fifth issue concerned the compensation awarded by the jury. Since Prudential had offered Flanigan a part-time job after her termination, the company argued that the compensation should be reduced by about $26,000 — the amount Flanigan would have earned in the part-time position. The Court stated that, although a discharged person has a duty to seek employment, he or she does not have to accept inferior employment. The part-time offer was inferior to Flanigan's former full-time job. Flanigan's refusal of inferior employment could not result in reduced damages.

Lastly, the Court considered punitive damages. In addition to the evidence showing breach of the covenant, the Court referred to testimony by Prudential's president that referred to older employees as "dead wood," "old dead wood," and "ballast." All the evidence was sufficient, the Court said, to justify a jury's award of punitive damages.

Prudential argued that $1.3 million in punitive damages was excessive and should be set aside. State law allows a Court to vacate damages if they appear have been based on passion or prejudice. However, the Court refused to consider the question: "[Prudential] failed to raise the issue of excessiveness in post-trial motions. The Court need not now consider that contention on appeal." Anyway, the Court said, "'[t]he amount to be awarded as damages is properly left to the jury and this Court will not substitute its judgment for that of the jury ...' While the punitive damages in this case are large, they are within the discretion of the jury..."

The Court made its decision by a four-to-three majority. However, the only issue on which the minority dissented was the amount of punitive damages. On all other issues, the Court appeared to agree unanimously.

Fetherston v. ASARCO, Inc. (1986, federal) — **tort, covenant, statute** *635 F. Supp. 1443 and 638 F. Supp. 1328*

This federal District Court case resulted in two opinions. Both are summarized here.

I.

The first decision dealt with two issues: (1) whether a determination of eligibility for unemployment insurance benefits collaterally estops a party from relitigating an issue of employee misconduct, and (2) whether failure to comply with 39-2-801, MCA, prevents an employer from presenting reasons for discharge in court. (The Montana Supreme Court later rendered two important decisions related to the first issue: *Nasi v. Dept. of Highways* (1988) and *Niles v. Weissman* (1990). Both are included in this booklet.)

Gerald Fetherston worked as a foreman for ASARCO at its East Helena plant. In August 1984, he got married; he and his bride went for a ride. They drove through the ASARCO plant area, contrary to a specific company rule for off-duty employees. Another employee observed this and reported the infraction. As a result, Fetherston received a four-day suspension without pay. In December 1984, he exacted his revenge on the informant: he punched him in the face at an East Helena bar. Shortly thereafter, Fetherston was fired.

Fetherston applied for unemployment benefits. His request was denied, as ASARCO said he had been fired for misconduct. Fetherston then tried to get his job back; ASARCO refused, but said they would no longer oppose his application for unemployment benefits. The Department of Labor then granted his request, subject to appeal. ASARCO did not appeal. Around this time, Fetherston wrote to an ASARCO supervisor, requesting a written statement of the reasons for his discharge. ASARCO did not respond.

Fetherston filed suit, alleging breach of the implied covenant of good faith and fair dealing. In his suit, he moved for partial summary judgment. Because ASARCO had not opposed his second application for unemployment benefits, he said, it should be collaterally estopped from raising additional issues regarding his discharge and from relitigating the issue of his misconduct. He also asserted that Montana law prevented ASARCO from introducing reasons for his discharge when it had failed to provide the requested written statement to him.

"The principle of collateral estoppel serves to prevent relitigation of a particular issue or determinative fact which was actually or necessarily decided in a prior action," explained the federal District Court. In this case, the issue was "whether a determination of entitlement to employment benefits by the Montana Department of Labor constitutes a final decision as the reasons for ... discharge ..." In prior cases, federal courts had ruled that collateral estoppel can be applied to decisions rendered by administrative agencies, but only after "a proceeding fully complying with the standards of procedural and substantive due process ..."

In Fetherston's case, the court noted, no formal hearing took place. "Montana unemployment compensation procedures are very informal," the court said. Given all the facts, "[t]he full panoply of issues which arises in a wrongful discharge suit is not within the realm of the Department of Labor's consideration of eligibility for unemployment benefits." Thus, the "case" had not been sufficiently "litigated" to bar ASARCO from defending the discharge in court.

The court decided against Fetherston on the second issue he raised, as well. The statute (39-2-801, MCA) says that if an employer fails to provided the requested written statement of the reasons for discharge, the employer may not "furnish any statement of the reason of such discharge to any person ..." Fetherston

said this law should prevent ASARCO from presenting any defense in court regarding his discharge, since they were barred from making any statement about the reasons for the discharge.

The court disagreed: "... the provision [of the law] was intended to serve as a shield rather than a sword." The law should protect employees from blacklisting and discrimination, said the court. "It is clearly not intended to prevent an employer accused of bad faith in a wrongful discharge action from raising incidents of the employee's work history in defense of its actions." The court denied Fetheston's motions, and the jury trial ended the same day.

II.
The jury ruled in favor of Fetherston, awarding $359,347 in damages on breach of the covenant of good faith and fair dealing. ASARCO moved for a new trial, claiming the court had given erroneous instructions to the jury in two areas.

First, said ASARCO, the court had itself determined that the implied covenant of good faith and fair dealing existed in the employment relationship between Fetherston and ASARCO, then told the jury to decide whether ASARCO had breached the covenant in firing Fetherston. Instead, according to ASARCO, the very existence of the covenant was a question of fact for the jury to decide, not the court. The court agreed that "the Montana Supreme Court has never expressly addressed the particular issue ..." The court then examined three Montana cases (*Dare, Crenshaw,* and *Flanigan)* and concluded that "the Supreme Court of Montana has implicitly approved the procedure applied by the Court in this case." Under this interpretation, the trial judge determines, after the submission of all evidence at trial, whether the covenant existed as a matter of law; the jury then determines, as a matter of fact, whether the employer breached the covenant.

Second, said ASARCO, the court's instructions to the jury improperly placed the burden on ASARCO to prove Fetherston's misconduct. Yet the court's instructions to the jury indicated that Fetherston had the burden of proving that ASARCO breached the implied covenant of good faith and fair dealing. The court laid out this series of events: 1) "Plaintiff has the burden of proving first, that a covenant ... was implied ..., and second, that the covenant was breached." 2) Once the plaintiff establishes a prima facie case, "defendant must then ... establish it had valid reasons for terminating plaintiff's employment." If the issue is misconduct, "defendant must be prepared to come forward with facts proving such a defense, rather than expecting plaintiff to disprove it." The court denied ASARCO's motion for a new trial.

Dawson v. Billings Gazette, et al. (1986) — ***tort, covenant, damages*** *223 Mont. 415, 723 P.2d 238*

Patrick Dawson had been a reporter for the Billings *Gazette.* When he was dismissed, he filed suit against the newspaper, alleging breach of the covenant of good faith and fair dealing. In a jury trial, Dawson won his suit — sort of. The jury found that the *Gazette* had breached its duty of good faith and fair dealing. However, the jury awarded zero damages, compensatory or punitive.

Dawson asked for a new trial and was turned down. He then appealed to the Supreme Court. The Court upheld the jury award on three grounds: 1) Dawson had three sources of income after his discharge (severance pay from the paper, unemployment insurance, and freelance fees); 2) he failed to mitigate his damages — i.e., he did not diligently pursue comparable full-time work after he was fired; 3) he did not sufficiently prove he had been damaged.

In upholding the District Court's refusal to grant a new trial, the Supreme Court noted that "the District Court must respect the jury's decision when conflicting evidence is present, as is the case here. To grant a new trial in light of conflicting evidence would be an abuse of discretion."

Mead v. McKittrick, et al. (1986) — ***statute, judicial immunity*** *223 Mont. 428, 727 P.2d 517*

June Mead worked for Cascade County in the District Court. She started work in 1976 as a deputy clerk. In 1979, she advanced to the position of personal secretary to Judge William Coder. Judge Coder resigned from the bench in 1983, and Thomas McKittrick was appointed to replace him. The new judge told Mead that he planned to open her position for applications. She applied but was not interviewed. McKittrick then discharged her.

Ten days later, McKittrick sent Mead a letter, stating the reasons for dismissal. Mead said the letter merely outlined work patterns she had established with Judge Coder. She said the discharge was unfair, as McKittrick had told her to continue with her previous duties.

In mid-1984, Mead filed suit against McKittrick, the county commissioners, and Cascade County, alleging violation of due process, breach of contract, breach of the covenant of good faith and fair dealing, wrongful discharge, and fraud. The judge and commissioners claimed immunity from suit and asked for dismissal. The District Court agreed, holding further that Mead was a court employee, not a county employee, and therefore "at-will."

Mead appealed. The Supreme Court held that "historically, judges have enjoyed absolute immunity for judicial acts." Further, the Court said, "the appointment and removal of key court employees is an effective judicial action." The Court reasoned that the secretary was highly important to the efficiency of the court, thus occupying "a distinct and unique status among District Court employees."

Since the Court found McKittrick's action to be a "judicial act," the Court also found the county and commissioners to be immune from suit. State law provides that "The state and other governmental units are immune from suit for acts or omissions of the judiciary."

In dissent, Justice Morrison felt that "judges, in the treatment of their personnel, are subject to the same rules to which others in society are subject." He would separate judicial acts from administrative acts, which he felt Mead's dismissal was. Further, Morrison felt the county was not immune, since it had independently reviewed and approved the judge's decision to fire Mead. "While the county is immune for Judge McKittrick's acts, the county is responsible for its own conduct."

Justice Hunt dissented along similar lines. He said the majority opinion "does not adequately treat the issue of the county's responsibility in this matter, the county's conduct as an employer is improperly ignored." Both Morrison and Hunt said that Mead was a county employee, and therefore entitled to the rights and due process granted her by county policy.

Maxwell v. Sisters of Charity of Providence (1986, federal) — ***contract*** *645 F. Supp. 937*

Dr. James Maxwell signed a contract in January 1980, to be director of radiation oncology at Columbus Hospital in Great Falls. In July 1982, the hospital gave him written notice that the contract would not be renewed on its next anniversary date, in January 1983. Maxwell sued for breach of contract and bad faith, claiming his contract could neither be terminated nor not renewed without good cause. He relied on the language of the contract, as well as that during the contract negotiations, he was led to believe his contract would not be terminated except for cause.

The court cited three principles of contract construction: 1) a contract must be construed according to the intentions of the parties at the time of execution; 2) if there is no ambiguity, the language of the contract governs its interpretation, and 3) other evidence may be used to explain the parties' intentions only if an ambiguity exists. The court quoted the contract clause and opined it was "clear and unambiguous." The contract could be terminated "simply by giving notice and that good cause was not required." Given this clarity in the contract, no other evidence need be considered.

With regard to the claim that the hospital breached the covenant of good faith and fair dealing, the court found no merit. "Since ... the [hospital] did not breach [the] employment contract, the [hospital] cannot be found to have acted unreasonably and in breach of the implied covenant of good faith and fair dealing ..." This ruling established a clear connection between breach of contract and breach of the covenant: if the contract was not breached, the covenant could not be. The Montana Supreme Court followed this precedent in the *Nordlund case* about 10 months later.

Miller v. Catholic Diocese of Great Falls, et al. (1986) — ***tort, covenant*** *224 Mont. 113, 728 P.2d 794*

Mary Miller taught fifth and sixth graders in Billings at the Little Flower School, a part of the Catholic school system administered by the diocese. Her first year of employment was rewarded with "outstanding" ratings in every category of her evaluation. The next year, though, Miller was under the supervision of a new "head teacher." This supervisor did not approve of Miller's teaching methods, particularly her "lack of discipline" in the classroom.

The head teacher talked with Miller on more than one occasion about the problem. Miller cited her previous evaluation, and felt that the problem was not discipline, but a difference of opinion on teaching methods. The school administrator, a priest, soon got involved in the dispute. He reflected on his own experience in Miller's classroom. He provided a few hours of religious instruction to the class each week, and he felt the lack of discipline there made the task difficult. Before the end of the first semester, the administrator fired Miller, stating the cause as lack of discipline in the classroom. Miller filed suit, saying the church had breached the covenant of good faith and fair dealing, particularly in not offering a hearing or other opportunity to defend herself. District Court granted summary judgment to the diocese on the grounds that applying the tort of breach of covenant would interfere with freedom of religion. Miller appealed.

The Supreme Court concluded that the case could present a question of breach of the covenant of good faith and fair dealing. However, by a four-to-three majority, the Court affirmed summary judgment on the issue of religious freedom.

The reason for dismissal involved discipline in the classroom. "The suggestion is made that consideration can be given to methods of discipline without becoming involved with claims which are rooted in a religious belief," the majority said. "A judicial determination of the presence or absence of good faith on the part of [the administrator] would require the court to examine the school's discipline policy as applied to classroom instruction covering both religious and nonreligious subjects, and to evaluate [the administrator's] interpretation and application of that discipline policy. Such an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion."

In dissent, Justice Morrison disputed that the case involved the teaching of religion. "Plaintiff's case here is premised upon the fact that she was denied due process in connection with her termination. She was not afforded an opportunity to change. She was not given a hearing in which she could explain her position. Although the church is entitled to set whatever standards it wants respecting and imparting religious education to its students, the law does require that certain fair procedures are necessary in order to accord due process." (Technically, "due process" does not apply here, since Miller's termination does not involve a state action. Rather, such notice and hearing are broadly accepted elements of "fair treatment" by a private employer.)

Justice Hunt also dissented. He criticized the majority's legal reasoning, saying "a wealth of case law indicates that although federal and state courts have no jurisdiction over solely internal ecclesiastical affairs or the validity of religious beliefs, they may exercise jurisdiction over torts incurred by religious institutions and in church controversy which impinges on property or civil rights." He continued, "In the present case the application of the tort of good faith and fair dealing to the church-operated school does not require a

determination of the validity of a religious belief. A clergy administrator's role, in itself, does not bar application of the tort of good faith or any other common law tort."

Brinkman v. State of Montana, et al. (1986) — ***tort, collective bargaining agreement*** *224 Mont. 238, 729 P.2d 1301*

When this case came before the Supreme Court, the sole question concerned whether a person may be barred from suing for wrongful discharge because he or she has failed to exhaust contractual remedies under a collective bargaining agreement. On that point, the Court affirmed summary judgment by the District Court in favor of the employer.

Albert Brinkman was a correctional officer at the Montana State Prison. In June 1982, he suffered an industrial injury; he applied for and received workers' compensation. Over the next year, he took leave from his job several times, citing a continuing disability from the injury. In July 1983, he had been on leave for several months. The prison sent him a letter requesting that he submit some leave forms and a doctor's statement. The prison set a deadline for the return of the forms, after which it would consider Brinkman on unauthorized leave subject to discharge.

Brinkman stated the forms were not enclosed with the letter. His wife said the prison extended the deadline and promised to send the forms; she said the forms never came. In any event, Brinkman did not provide the requested information by either deadline.

In August, Brinkman went to the prison with a doctor's statement releasing him to return to work. The prison told him he had been fired and could not enter the prison. At that time, Brinkman tried to contact a union representative who was at work in the prison. The gate guard made a number of calls to the representative for Brinkman, but the representative never showed up. Finally, Brinkman left the prison; he made no further attempt to contact the union.

Brinkman filed suit against the state, claiming the prison had 1) fired him in retaliation for his industrial injury, and 2) violated the covenant of good faith and fair dealing. The prison asserted that Brinkman could not sue, since he had not used the grievance procedure in collective bargaining agreement.

The Court found that 1) Brinkman was a member of the union; 2) the union said he was covered by the collective bargaining agreement as long as he was an employee; 3) the prison considered him an employee until the time of his discharge, and 4) the contract grievance procedure was available to challenge discharge. Given these facts and several precedents, the Court held that Brinkman could not sue in court without having gone through the grievance procedure first.

In addition, the Court refused to consider Brinkman's claim that the prison had breached the covenant of good faith and fair dealing. "In this case, the [collective bargaining agreement] provided that the employer could only discharge employees for 'just cause.' Therefore, we will not imply the covenant of good faith and fair dealing into this employment relationship." The Court reasoned that the covenant applies to at-will employment situations; where the employment is covered by an explicit contract (the collective bargaining agreement), no other covenant need be implied.

Smith v. Montana Power Company (1987) — ***tort, preemption*** *225 Mont. 116, 731 P.2d 924*

This case bears some similarity to the *Brinkman case* above. John Smith began employment near the end of 1981 as an instrument and control journeyman for MPC at Colstrip. During his employment, he belonged to the electrical workers union. In September 1982, he was fired.

Smith claimed that he tried to file a grievance under the collective bargaining agreement, but that MPC refused to discuss the case with the union representative. The company claimed that Smith failed to exhaust

the grievance procedure. District Court granted summary judgment to MPC as a matter of preemption, i.e., federal labor law preempted Smith's tort claim under state common law.

On appeal, the Supreme Court found that "the issues surrounding Mr. Smith's discharge are questions of federal contract interpretations." The Court concluded "that the District Court did not err in holding that Mr. Smith's negligence and good faith claims were preempted by federal law. This decision is necessary to insure a unified body of labor-contract law and preserve the central role of arbitration in labor disputes." As a final note, the Court cited the *Brinkman* case (above). Although District Court had ruled on the basis of preemption, the Supreme Court noted that the failure to exhaust a grievance procedure, as in *Brinkman*, might also apply.

City / County of Butte-Silver Bow v. Montana State Board of Personnel Appeals (1987) — ***statute, contract*** *225 Mont. 286, 732 P.2d 835*

In this decision, the Court reviewed a decision by the Board of Personnel Appeals that was just one part of a long legal battle. Gale Wood was a police officer in Butte-Silver Bow; he was fired after a hearing before the Butte-Silver Bow Law Enforcement Commission. He filed for judicial review and ended up taking it to the state Supreme Court, which affirmed the process and upheld the firing.

As all that was going on, Wood worked with his union to grieve the firing. Butte-Silver Bow refused to process the grievance, saying Wood's statutory remedy under the Metropolitan Police Act was the exclusive remedy for the dispute. (The Act provides the process described in the previous paragraph.) Wood's union filed an unfair labor practice complaint with the Board of Personnel Appeals. The board's hearing examiner ordered Butte-Silver Bow to process the grievance. Butte-Silver Bow appealed to the full board, which affirmed the examiner's findings. Butte-Silver Bow filed for judicial review in District Court; the court affirmed the board. Butte-Silver Bow appealed.

The Supreme Court framed the issue as "whether the grievance procedure in the ... collective bargaining agreement ... provides a remedy ... in addition to that set out in ... the Metropolitan Police Act." The Court found that the collective bargaining agreement specifically incorporated the Metropolitan Police Act and did not provide a grievance procedure for termination. Thus, under the terms of the agreement, Wood's case would have to proceed under the Metropolitan Police Act. It did, so Butte-Silver Bow did not commit an unfair labor practice.

The Court's decision was four – three. Justice Sheehy dissented, with concurrence from Justices Hunt and Morrison. In the dissenting interpretation, Sheehy said, "Nothing in the collective bargaining agreement excluded, withdrew or canceled the right of the employee to found a grievance on the termination proceedings before the police commission ..." If Butte-Silver Bow disagreed with using the grievance procedure, reasoned Sheehy, "under the grievance procedure it could refer that question to an arbitrator. ... Instead it chose to breach its grievance procedure agreement ... and was thereby guilty of an unfair labor practice."

Drinkwalter v. Shipton's Supply Company, Inc. (1987) — ***discrimination, tort*** *225 Mont. 380, 732 P.2d 1335*

This case involves allegations of sexual harassment surrounding a voluntary termination. At issues was whether the plaintiff had to pursue remedies under the Human Rights Act or could bring an independent tort action. The decision here prompted legislative action, and the Supreme Court upheld that change in *Harrison v. Chance* (see page 63).

Pam Drinkwalter worked for Shipton's Supply from October 1980 to July 1983. Her supervisor was Greg Carroll. In July 1983, Drinkwalter quit her job after complaining to Carroll's brother, also a supervisor in the company, about sexual comments and actions by Carroll. In October 1984, she filed suit, claiming sexual harassment, breach of the covenant of good faith and fair dealing, and negligence.

Shipton's Supply moved for summary judgment; it argued that Drinkwalter's complaint of sexual harassment fell under the Human Rights Act. Under that act, a complainant must press an action with the Human Rights Commission or receive a "right to sue" letter from the HRC. Without the letter, no action can be brought in court. In addition, the Human Rights Act sets a 180-day statute of limitations; Drinkwalter made her first complaint 16 months after the harassment — and her employment — ended. District Court granted summary judgment, and Drinkwalter appealed.

The Supreme Court looked at the similarity between the Montana and federal antidiscrimination statutes. The Court also acknowledged that federal courts have defined sexual harassment as a form of sex discrimination, subject to statutory remedies. However, said the Court, "Traditional remedies for sexual harassment are rooted in common law. Since there is no federal common law remedy for sexual harassment, it is defined and treated as sexual discrimination." The Court continued, "Such is not the situation in Montana."

The Court found three bases for allowing a sexual harassment complaint to proceed in common law. First, Article II, § 4 of the Montana Constitution provides for the protection of every person's dignity. Second, the Court "has recognized a cause of action for a discharge from employment which violates public policy. Sexual harassment is against public policy." Third, the Court stated, "Good faith and fair dealing preclude sexual harassment."

The Court thus held that "the facts alleged by Pam Drinkwalter could support common law theories rooted in tort law distinct from and in addition to sexual discrimination charges covered by Montana's Human Rights Act. To hold otherwise would result in the elimination of established common law causes of action. Absent a clear indication of the legislature's intent to abrogate existing common law remedies, we must construe new statutory remedies as existing in addition to, rather than instead of, the common law remedies." The Court reversed summary judgment and remanded the case.

Justice Gulbrandson dissented. He would view sexual harassment as a form of sex discrimination. Accordingly, "the exclusive remedy for that harassment is provided by the [Human Rights] Act. There is no common law remedy for sexual harassment, in and of itself, in Montana."

Kerr v. Gibson's Products Company of Bozeman (1987) — ***tort, covenant*** *226 Mont. 69, 733 P.2d 1292*

Penny Kerr worked five and one-half years for Gibson's, starting in 1978. Gibson's terminated her employment in what it said was a lay-off for economic reasons. Kerr had performed satisfactorily throughout her employment, advancing from her initial clerk position to department head. She never received disciplinary action, but did receive a bonus in 1983.

Beginning in 1980, Gibson's went through a period of economic difficulty. In February 1984, the company terminated Kerr during her shift, without notice or severance pay. Contrary to policies stated in its handbook, Gibson's did not offer a transfer, reduced hours, or reduced pay, nor did it provide recall rights. The handbook also promised layoffs would occur without prejudice, yet it placed "No Rehire" in Kerr's termination report. It refused to provide her a reference letter. Gibson's called the action a reduction in force, yet replaced Kerr within four months with a lower paid employee.

Kerr sued and won her case in District Court. Gibson's appealed. The Supreme Court found that Gibson's handbook and other "objective manifestations" in Kerr's employment implied the covenant of good faith and fair dealing. "As an employer, Gibson's was freely able to enforce employee handbook rules of conduct. It likewise follows that Kerr, as an employee, could reasonably rely on the procedures outlined in Gibson's employee handbook during employment termination." Citing *Gates* (see page 7) and *Dare* (see page 12), the Court upheld the trial court's procedures. On a second issue, the Court upheld the compen-

satory damages ($59,026) awarded by the jury. The award included "prospective pay" through 1989, when Kerr had planned to start raising a family. It also included Kerr's share of Gibson's profit-sharing plan, which was disbursed after her termination when Gibson's sold out to another company. Here, the Court affirmed expert testimony that guided the jury in setting the amount of compensatory damages.

McClain, et al. v. NERCO, Inc., & Spring Creek Coal Co. (1987) — ***tort, covenant***

227 Mont. 393, 738 P.2d 1285

NERCO-Spring Creek mined coal at Decker. Their major contract customer was a group of Texas utilities, the "Houston Group." On July 15, 1982, the Houston Group filed suit against NERCO and Spring Creek seeking to permanently reduce the amount of coal it had to accept monthly under contract. On July 21, the parties to the suit negotiated a tentative settlement allowing reduced quantities of coal. On July 23, Spring Creek laid off half of its work force. On July 28, NERCO, Spring Creek, and the Houston Group signed an Interim Agreement allowing dismissal of the Houston Group lawsuit.

After the lay-off, 65 coal miners filed suit against NERCO and Spring Creek. They sought relief under a number of different theories. In time, settlement was reached on all issues save one: the miners alleged in a "fourth amended complaint" that Spring Creek had assured them of job security based on the long-term coal contract. Further, they alleged that NERCO, Spring Creek, and the Houston group conspired to bring a sham lawsuit, creating grounds for the massive lay-off. This conspiracy, plaintiffs said, constituted a breach of the implied covenant of good faith and fair dealing.

District Court granted summary judgment to NERCO and Spring Creek, and the plaintiffs appealed. At issue before the Supreme Court was whether the District Court had erred in granting summary judgment.

First, the Supreme Court disposed of the issue of implied job security. With the fourth amended complaint, all parties had agreed to dismiss with prejudice all other claims arising in the suit. Since the fourth amended complaint dealt only with the conspiracy claim, the issue of job security could not be considered.

As evidence to support the conspiracy theory, the miners offered only the timing of the events occurring in quick succession: 1) Houston Group filed lawsuit, 2) NERCO and Spring Creek negotiated with the Houston group, 3) Spring Creek laid off employees, and 4) NERCO, Spring Creek, and the Houston group reached an Interim Agreement. NERCO and Spring Creek presented extensive documentation that its financial crisis was real and the Houston Group lawsuit was genuine. The Supreme Court concluded, "plaintiffs have not presented any evidence of a conspiracy. There is no genuine issue of material fact." Thus, the grant of summary judgment was affirmed.

Nordlund v. School District No. 14, et al. (1987) — ***contract*** *227 Mont. 402, 738 P.2d 1299*

James Nordlund began teaching at Malta High School in 1956. In 1966, he became district superintendent, under written contract with the school board. From 1966 to 1983, Nordlund worked under a series of two-year contracts. In January 1983, the school board offered a one-year contract for the 1983-84 school year. The contract contained no option for renewal, nor did it refer to the possibility of renewal.

In January 1984, the school board decided not to renew Nordlund's contract beyond June 30, 1984. It took this action in full compliance with state law. Nordlund sued the district for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress. He then amended his complaint to say that the contract was "open-ended," rather than for a definite term, and that the school board had violated the Open Meetings Law when it voted not to renew his contract. District Court dismissed the lawsuit, noting the plaintiff failed to state a claim on which relief could be granted. Nordlund appealed, saying the District Court erred in interpreting his contract as an express contract for one year.

The Supreme Court noted that "[w]here the language of a written contract is clear and unambiguous there is nothing for the court to construe." Further, the Court said, "[c]ourts have no authority to change the contract or disregard the express language used." The Supreme Court agreed with District Court that "the contract [was] sufficiently clear and unambiguous in its intent." Further, the Court noted, since superintendents may not acquire tenure in their positions, no implication for renewal could be read into the contract. Thus, the dismissal was correct, for "[t]here was no ambiguity for which the district judge was required to submit the case to a jury for a factual determination."

On the breach of covenant issue, the Supreme Court reiterated that the school board followed all its legal obligations in dealing with Nordlund's contract. "[B]ecause no breach of contract occurred, it cannot be said that the school board breached the implied covenant of good faith and fair dealing." In affirming the lower court's dismissal, the Supreme Court agreed that "no set of facts would support Nordlund's claim of a contract for an unspecified term, or 'open-ended' term ...."

Anderson and Anderson v. TW Corporation, et al. (1987) — ***tort, preemption*** *228 Mont. 1, 741 P.2d 397*

Robert Anderson was employed in the garage operated by TW Services in Yellowstone National Park. he began work in 1970, and from 1971 until his resignation in July 1982, he served as shop foreman. Throughout his employment, he was a member of the International Association of Machinists and Aerospace Workers union. In June 1982, Anderson was involved in the clean-up of a degreaser (Tensene) spill. He developed a skin allergy from contact with the substance and went on sick leave. His doctor advised him to avoid all contact with petroleum products.

While Anderson was on sick leave, the company changed his job description, requiring 75% mechanic work and 25% supervisory work. This change would make it unavoidable for Anderson to come into contact with petroleum products. The union represented Anderson in a grievance, and by mutual agreement, the company would return Anderson to his former position. Anderson continued to object to the job description but said the union refused to proceed any further with his claim. Anderson quit and filed suit against the company, alleging "constructive discharge." In the same suit, his wife, Violet Anderson, stated a claim for damages due to emotional distress and mental anguish resulting from the company's actions with her husband.

District Court granted summary judgment to TW Services on all issues of the suit, stating that Anderson's claims were preempted by federal labor law. Anderson appealed. The Montana Supreme Court cited U.S. Supreme Court decisions and its own decisions in affirming the District Court decision (see *Brinkman* and *Smith*, pages 24). The Court cited the U.S. Supreme Court's findings that "plaintiffs may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort."

Barnes v. Koepke, Big Springs, and Glacier County (1987) — ***statute, legislative immunity*** *260 Mont. 470, 736 P.2d 132*

This lawsuit was brought against Glacier County and two of its commissioners by Ronald Barnes, the discharged administrator of the hospital in Cut Bank. Barnes, however, was not a county employee; he had been hired by Brim and Associates, a hospital management firm under contract to the Glacier County Hospital Association, a nonprofit corporation leasing the hospital from the county. Barnes began his tenure as administrator in 1981. Very quickly, disagreement and dissension arose between Barnes and much of the hospital staff. In October 1983, the hospital staff demanded that the Hospital Association fire Barnes, but it refused to do so.

On June 30 1984, the county commission voted to not renew its lease with the Hospital Association. Subsequently, Brim and Associates fired Barnes. Barnes's lawsuit against the county alleged that the commis-

sioners' personal dislike of him led them to terminate the lease for the sole purpose of securing Barnes's discharge.

In District Court, the defendants moved for and received a dismissal. The basis of this action was the legislative immunity statute (2-9-111, MCA), which at that time read:

> **Immunity from suit for legislative acts and omissions.** (1) As used in this section: (a) the term "governmental entity" includes the state, counties, municipalities, and school districts; (b) the term "legislative body" includes the legislature vested with legislative power by Article V of the Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards.
> (2) a governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.
> (3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.

The Montana Supreme Court upheld the dismissal, saying that the statute clearly provides immunity for the county and the commissioners. The decision not to renew the lease was clearly a legislative action. Barnes tried to make the case that acts committed in bad faith and with malice should not be considered the "lawful discharge of an official duty." The Court refused to examine the motives for the commission's action; the commission had the authority to renew or not renew the lease, so it was immune from lawsuit.

*(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary. The amendments likely would not have changed this ruling, though.)*

Belcher v. Department of State Lands (1987) — tort, public policy, covenant
228 Mont. 352, 742 P.2d 475

Herb Belcher was hired in September 1980, as a communications engineer for the Department of State Lands's Fire Suppression Bureau in Missoula. In 1982, his supervisor began receiving complaints about Belcher's work. Among other allegations, the complaints stated that Belcher's work on the statewide communication plan he was responsible for was inadequate. Belcher received a disciplinary memo in January 1983, concerning the private use of a state vehicle.

In April 1983, Belcher was told to concentrate on the statewide plan to the exclusion of all other work activities. Problems continued with Belcher's work, and his supervisor continued to document all evidence that came to his attention. In January 1984, Belcher was given a notice of corrective discipline. It informed him of the grounds for disciplinary action, what improvements were needed, and the possibility of termination if his work did not improve. Belcher was given 60 days to correct his performance deficiencies and became subject to weekly performance evaluations. Belcher's performance did not improve, despite frequent meetings with his supervisor. In April 1984, the department fired Belcher.

Belcher filed suit against the department in February 1985, alleging that the department fired him without just cause. He further claimed that the department violated public policy, breached its contract of employment with him, and breached the covenant of good faith and fair dealing. District Court granted summary judgment in favor of the department. On appeal, the Montana Supreme Court agreed: "Belcher was not doing his job; he had received notice that his work was not adequate; he failed to rectify the situation, and he was subsequently discharged. It appears to us that no basic question of fact exists for jury determination and Belcher does not raise any specific fact question."

The Court went on to conclude that "[s]upervisors had issued reprimands, notices of corrective discipline, and notices of punitive discipline throughout Belcher's 43 months of employment. He had the chance to

rebut these charges, but chose not to do so. He had the right of grievance, but failed to exercise it. Furthermore, Belcher was unable to show the District Court that public policies were affected by dismissal other than his own belief that just cause was violated."

"It is clear from the record, the deposition of Belcher, and Belcher's own conduct that he knew his job was in jeopardy. The Department repeatedly attempted to help him until the situation was out of control. These particulars represent notice to Belcher that he had to improve or risk discharge. The Department recognized the duty to act in good faith and abided by it."

Malloy and Malloy v. Judge's Foster Home Program, Inc. and Vaughan (1987) — ***contract, tort, covenant*** *229 Mont. 317, 746 P.2d 1073*

From 1982 to 1985, Tom and Harriet Malloy worked under contract as group home parents at Discovery House, a group home operated in Anaconda by Judge's Foster Home Program. In 1985, Judge's contracted solely with Harriet Malloy; Tom was not a party to the contract nor was he named anywhere in the contract.

In April 1986, a social worker witnessed an incident in which Tom Malloy verbally abused a client in the group home. Harriet Malloy was also present. The social worker filed a complaint with the Discovery House Director, Sister Gilmary Vaughan. Harriet Malloy was suspended, pending an investigation by the Department of Social and Rehabilitation Services, which licensed the program. SRS found Tom Malloy culpable for the abuse and Harriet Malloy negligent for not intervening. Sister Vaughan then sent Harriet a letter, outlining conditions for continued employment and directing her to return to work a week later. Harriet did not agree with the letter and did not return to work as directed. She asked for a hearing on the complaint against Tom, but Discovery House refused to grant one. About three months later, Discovery House terminated Harriet's contract for her continued refusal to return.

The Malloys filed suit, alleging breach of contract , violation of public policy (denial of due process), and breach of the covenant of good faith and fair dealing. District Court dismissed the suit, and the Malloys appealed. The Supreme Court upheld the dismissal. Tom Malloy had no grounds to sue; he was not a party to the contract between Discovery House and Harriet, and there was no other employment relationship involving him. On Harriet's claim, the Court pointed out that "[i]t is a well settled rule of contract law that a party who commits the initial breach cannot complain of a subsequent breach by the other party." Since Harriet breached the contract by not reporting to work as directed, she had no grounds to complain that Discovery House had breached the contract by terminating it.

Since Discovery House had refused Harriet a hearing, she claimed that her due process rights had been violated. She asserted that the written contract granted her a property interest, entitling her to due process prior to termination. The Supreme Court refused to go along, saying she had shown no "independent source" that would establish a property interest. Finally, on the issue of breach of the covenant of good faith and fair dealing, the Court held that Discovery House had made several efforts to resolve the situation fairly with Harriet Malloy, but she had refused to cooperate. Her refusal to return to work constituted a "legitimate business reason" for discharging her.

Riley v. Warm Springs State Hospital, et al. (1987) — ***tort, covenant, preemption*** *229 Mont. 518, 748 P.2d 455*

Michael Riley worked for two months as a psychiatric aide at Warm Springs State Hospital. In July 1979, he was discharged while still on probationary status. The hospital claimed the reasons for termination were excessive absenteeism and sleeping on the job. Riley attempted to file a grievance through the union that represented him, but was told that the time period for grieving the dismissal had expired. He did, however, receive a meeting of himself, management, and union representatives. The hospital restated its reasons for termination and presented its supporting evidence. The union representatives agreed that the termination was justified. Riley's discharge was final.

Riley filed suit in March 1980, and the case came to trial in February 1986. The jury found for Riley and entered separate awards of $18,343 each against the hospital and the union. The jury based it verdict on a breach of the covenant of good faith and fair dealing, even though the discharge occurred in 1979, and the covenant was first recognized by the Montana Supreme Court in 1982. The hospital appealed.

Actually, two cases came under consideration: 1) the *Gates* case (see page 7), which established the covenant of good faith and fair dealing, and 2) the *Brinkman* case (see page 24), which barred a claim of breach of the covenant when plaintiff was covered by a collective bargaining agreement. The hospital objected to retroactive application of the covenant, and Riley objected to the possible retroactive application of the *Brinkman* principle.

The Supreme Court discussed nonretroactive application of a decision, saying three conditions must be met: 1) the decision establishes a new principle of law by overruling precedent or by deciding an issue with a result "not clearly foreshadowed"; 2) the new rule must be examined to see if retroactive application will "further or retard" its operation; 3) the court must consider the "equity of retroactive application."

In reaching its decision, the Court stated, "Although it can be argued that both *Gates* and *Brinkman* established new principles of law, it can also be argued that both principles were clearly foreshadowed." On the second condition, the Court said, "[R]etroactive application will further the operation and purpose of the rules set out in both *Gates* and *Brinkman*." On the third condition, the Court cited that both Gates and Brinkman were terminated before their respective lawsuits resulted in the new principles of law. "We conclude that to have retroactively applied the rules in the two previous cases and not to apply them in this case would be clearly inequitable."

The Court concluded its decision by saying the covenant of good faith and fair dealing did apply retroactively, except that Riley's claim was barred by a retroactive application of the Brinkman principle. The jury award to Riley was overturned.

Stark v. Circle K Corporation (1988) — ***tort, covenant*** *230 Mont. 468, 751 P.2d 162*

A unique aspect of this case revolved around the company's use of an "at-will clause" on its employment application form. The Supreme Court rejected this tactic as a way of absolving the employer from its obligation under the covenant of good faith and fair dealing and noted the employer still would need to show "a fair and honest reason" for the termination in order to successfully defend it.

Circle K hired Greg Stark in Butte in December 1981. The company's application contained an "at-will clause," which stated, "subsequent to being employed, I may be dismissed with or without cause." Stark apparently performed well with Circle K, receiving several promotions and raises. By November 1983, he was zone manager, in charge of eight stores.

Throughout Stark's employment, he received regular evaluations. He consistently received "very good" to "superior" ratings, and the district manager rated him the best zone manager. However, the blossom wilted. The district manager became concerned about inventory shortages in the district, and he specifically addressed severe shortages at three of Stark's stores. In August 1984, he met with Stark and presented him with a written "Employee Counseling Report" that cited the inventory shortages and placed Stark on a 30-day probation. Stark refused to sign the report, saying other zone managers had shortages but were not receiving the same treatment.

A few days later, Stark attended a regular managers' meeting, but no mention was made of the inventory problems. On August 22, the district manager again met with Stark and presented the counseling report for Stark to sign. Stark again refused and was fired for insubordination in his refusal to accept responsibility for the inventory shortage.

At trial in the subsequent lawsuit, several factual discrepancies surfaced. The district manager said he had not preplanned Stark's termination, yet he had come to the meeting with Stark's final paycheck and had brought along another manager to drive Stark's company vehicle back to Great Falls. The amount of inventory shortage came into question. The district manager had told Stark he would look into the inventory figures, but he never did. Stark rechecked the figures and found inaccuracies; the evidence at trial supported his position. The district manager also appeared not to have followed the Circle K progressive disciplinary policy. In addition, the district manager testified that an employee does not have the right to refuse to sign a counseling report; Stark, the company's personnel expert, and a higher company manager all testified that company policy allowed such refusal. Evidence at trial also confirmed Stark's allegations that other zone managers in the same district had significant inventory shortages without receiving discipline. In its verdict, the trial jury said the company had breached the covenant of good faith and fair dealing and awarded Stark $200,000 compensatory damages and $70,000 punitive damages.

Circle K moved for a judgment notwithstanding the verdict and for a new trial. The District Court denied both motions, the company appealed. The company complained that insufficient evidence was present to support the breach of covenant finding. Thus, the motion for judgment n.o.v. was improperly denied. The Supreme Court disagreed, saying, "A court will not substitute its judgment for that of the jury. Evidence may be inherently weak and still be sufficient to uphold a jury verdict."

Circle K also contended that the at-will clause on its employment application was a contractual provision that precluded a breach of the covenant. The Court countered that the covenant "is implied as a matter of law based on the public policy of this State. It does not depend on contractual terms for its existence, nor is [it] subject to contractual waiver, express or implied." In addition, the Court said that several "objective manifestations" existed that established the covenant between Circle K and Stark.

Circle K argued, in the alternative, that it did have good cause to fire Stark. It claimed that good cause should be determined by the employer and not be subject to review by a jury. The Court disagreed, describing the covenant as "designed to prevent the abuses of unfettered discretion inherent in a situation of unequal bargaining power. An employee is not required to leap at his master's every command." On the main issue of termination, the Court said, "We will not require an employee to sign a written statement he believes to be false so that an employer can later justify termination."

"To rebut Stark's allegation," the Court continued, "Circle K need only have shown a fair and honest reason for termination. Circle K apparently failed to do so, however. Contrary to Circle K's assertion, the jury, as the trier of fact, does determine whether good cause existed." In examining the record, the Court noted that the district manager "was impeached on several matters, that his testimony conflicted with prior testimony given at an unemployment compensation hearing, and that his testimony conflicted with the documentary evidence." Coupling this with the fact that "[t]he jury as trier of fact, determines the credibility of a witness and the reason for termination," the Court concluded, "[T]here is sufficient credible evidence to support the jury verdict."

Other issues of appeal concerned the amount of damages and method of determining them. In addition, Circle K claimed that an absence of proof ruled out the punitive damages awarded Stark. The Court cited the Flanigan case as precedent and said, "The apparent lack of candor on the part of [the district manager] is sufficient for the jury to have inferred malice." In sum, the Supreme Court affirmed every issue on appeal from the District Court.

Nasi v. State Department of Highways (1988) — ***tort, covenant, res judicata*** *231 Mont. 395, 753 P.2d 327*

Larry Nasi began working for the Department of Highways (DOH) at Townsend in February 1979. In June 1982, the employment ended. Nasi claimed he was fired; DOH claimed he voluntarily quit. In March

1984, Nasi filed a grievance with the state Board of Personnel Appeals (BPA). In April 1984, he filed a tort action against DOH in District Court. The court stayed this lawsuit until the BPA grievance was complete.

Nasi's BPA grievance proceeded from preliminary findings through a full hearing to a judicial review. He lost at every step; the finding was that he had voluntarily quit. Nasi did not appeal the judicial review from District Court. In August 1986, District Court lifted the stay on Nasi's tort action, and in June 1987, the court granted summary judgment to DOH on the grounds that the matter was *res judicata.*

Res judicata is a legal doctrine of judicial finality: "a party should not be able to relitigate a matter he or she has already had an opportunity to litigate. This policy reflects the notion that a lawsuit should not only bring justice to the aggrieved parties but provide a final resolution of the controversy."

On Nasi's appeal of the summary judgment, the Supreme Court held that *res judicata* had been correctly applied: "*Res judicata* applies when administrative proceedings possess a judicial character." The BPA grievance, resulting in a full evidentiary hearing, was judicial in character and under the law. Since Nasi's lawsuit and grievance both involved the same issues and facts, the Court would "not allow Nasi to relitigate his grievance in a tort action raising the same issue previously litigated."

Meyers v. Department of Agriculture (1988) — **statute** *232 Mont. 286, 756 P.2d 1144*

William Meyers worked for two months as a potato inspector for the Department of Agriculture. After his termination, he filed a grievance with the department; he received $671 as a result of a grievance panel recommendation in his favor. He also received $184 in unemployment benefits.

Meyers was dissatisfied with the grievance outcome and filed suit. The case came to trial, and the jury awarded him $850 in damages. The District Court offset the award by the $671 he had already received from the department and $179 of the sum he had collected in unemployment. Meyers appealed on three issues: 1) the offset, 2) a partial summary judgment before trial that precluded an award of wages he might have earned, and 3) an attempt to recover penalties, court costs, and attorney fees. He lost on all three issues.

On the first issue, the Supreme Court relied on the District Court's statement that Meyers and the Department had agreed to the offset prior to the trial. Meyers did not refute this statement. On the second issue, Meyers relied on three statutes regarding payment of wages (39-3-204 – 206, MCA). However, the Court ruled, based on the *Como* case (see page 10), that the laws apply to wages already earned and owed to the employee at the time of termination, not to wages that might have been earned had the termination not taken place. On the third issue, Meyers sought penalties and other costs under the same statutes (39-3-204 – 206, MCA). This issue was already decided, and the Court disagreed with Meyers that there were any other grounds for awarding penalties and costs.

Janz v. Quenzer, d/b/a Ben Franklin Store (1988) — **tort** *232 Mont. 440, 756 P.2d 1174*

Alma Janz and her daughter, Roxanne, worked at the Ben Franklin store in Baker. The owner was in the process of selling the store to Duane Quenzer, who told Janz he planned to keep her on as an employee when he became owner. Prior to the sale being final, the seller and buyer agreed to take inventory to establish its value. Janz helped take inventory, under the employ of the seller. On November 4, 1983, inventory was completed or near completion, and Alma and Roxanne showed up for work. Quenzer told Roxanne she couldn't wear jeans to work. An argument ensued, and the two women walked out. Quenzer asked Alma Janz for her keys to the store; she refused, saying they belonged to the seller.

Alma Janz sued for wrongful discharge, alleging breach of public policy, of an express contract for employment, and of the covenant of good faith and fair dealing. District Court granted summary judgment for Quenzer on the grounds that he did not own the store and did not employ Janz at the time she walked

out. On appeal, the Supreme Court noted, "The resolution of this issue depends on the existence of a material question of fact on whether Quenzer employed or contracted to employ Janz," since a material question of fact would preclude summary judgment and send the case to trial. The Supreme Court agreed with District Court that "no reasonable inference may be drawn that either the contract or the [employment] relationship existed."

Although Janz made several points to show that Quenzer was in control of the store and employed her, the Court rejected each of them in favor of four undisputed points asserted by Quenzer: 1) he did not yet own the store the morning of November 4, 1983; 2) the seller paid Janz's wages through November 3, 1983; 3) a Ben Franklin franchise representative was in control of the store during inventory, and 4) Janz refused to give Quenzer the keys, saying they belonged to the seller.

Bieber v. Broadwater County and Duede (1988) — ***tort, legislative immunity***
232 Mont. 488, 759 P.2d 145

(NOTE: The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)

This case further defined the immunity from lawsuit provided to legislative bodies by § 2-9-111, MCA (see *Barnes* case, page 28). James Bieber worked for the Broadwater County road crew, starting as a part-time employee in September 1983 and moving to full-time in April 1984. William Duede was a county commissioner who supervised the road crew — assigning work, hiring, and firing. In February 1986, Duede fired Bieber for abusing county road equipment. He did not consult with the other commissioners before taking the action, but later told them what had happened. They concurred with his action.

Bieber sued the county and Duede for wrongful discharge. District Court granted summary judgment in favor of the defendants on the basis that they were immune from lawsuit under the statute. On appeal, Bieber argued that the law covers purely "legislative" acts and excludes day-to-day "administrative" acts, such as Duede's management of the road crew. The Supreme Court refused to recognize the difference "because the plain language of the statute makes no such distinction." Bieber secondly contended that Duede, in firing Bieber, was not discharging an official duty associated with "the introduction or consideration of legislation or action" by the county commissioners. The Court said "Duede clearly had an official duty to oversee and administer the maintenance and repair of county roads ... In firing Bieber, Duede was discharging his lawful duty as commissioner. He cannot be sued for that action under the current law."

Finally, Bieber challenged the constitutionality of § 2-9-111 on the basis of equal protection and access to the courts. The Montana Constitution guarantees citizens access to the courts for redress of wrongs done to them. The Supreme Court stated, "[A]ccess to the courts is not an independent fundamental right." Since a fundamental right is not involved, the Court need only find a rational basis for the law that excludes some employees from suing. The Court held that the reason for legislative immunity "is to insulate a decision or law-making body from suit in order to prevent its decision- or law-making processes from being hampered or influenced by frivolous lawsuits. This reason satisfies the rational basis test." Thus, the Court affirmed summary judgment against Bieber.

Missoula County School District v. Anderson, Bowman, and Argenbright (1988) — ***due process*** *232 Mont. 501, 757 P.2d 1315*

This teacher-termination case came to the Supreme Court through the administrative process. The Court reversed the District Court decision, which had reversed the State Superintendent of Public Instruction's decision. In the end, it came out in the teacher's favor.

Carol Anderson taught special education for 13 years in the Missoula school district. The special education program had three teachers working together. Anderson always received satisfactory evaluations for

her teaching. For the 1983-84 school year, Anderson took an unpaid leave. During that time, special education enrollment declined, and the district decided to cut the program to two teachers.

Anderson had renewed her contract with the district for the 1984-85 school year. To determine a transfer to another teaching position, she went through four structured interviews with district administrators. She didn't do well in any of the interviews. Based on those results and the administrators' recommendations, the school board terminated Anderson's contract for "incompetence."

Anderson appealed the decision through the statutory process. The County Superintendent of Schools held a hearing and ruled that the district had not met its burden of proof that Anderson was incompetent. The district appealed to the State Superintendent of Public Instruction, who affirmed the decision. The district then filed for judicial review in District Court. District Court reversed the State Superintendent's decision, and Anderson appealed to the Supreme Court.

In reviewing the District Court decision, the Supreme Court noted, "The [district] court erroneously states that 'the issue in this case is how much evidence is need to demonstrate teacher incompetence.' The actual issue ... was whether the administrative agency ... abused its discretion in its conclusion of law or whether the findings of fact were clearly erroneous. Upon review of the record, we hold that the District Court erroneously substituted its judgment for that of the State Superintendent of Public Instruction." Accordingly, the Court reversed District Court, reinstating the decision of the State Superintendent.

Frigon v. Morrison-Maierle, Inc., Enright, and Larsen (1988) — ***tort, covenant***
233 Mont. 113, 760 P.2d 57

Morrison-Mairle is a consulting engineer firm with headquarters in Helena. This dispute arose in its Billings office. Lorraine Frigon began working as a part-time secretary in January 1984. Morrison-Maierle gave her a handbook, which explained, in part, that employees receive annual performance reviews and salary reviews. Frigon was informed she would receive her first reviews after six months. In July 1984, Bill Enright told Frigon she was due a merit raise, but he didn't have time to do a performance review. In October 1984, Frigon asked for and received a performance review from Larry Larsen. A month later, Philip Green became Frigon's supervisor. Frigon asked for an annual performance review in January 1985, but there was no record it took place.

In July 1985, Green gave Frigon a performance review; he told her he had recommended a merit raise, but the head office had turned it down on the basis of negative comments from Enright and Larsen. Frigon asked that they put their comments in writing. Reluctantly, they did so. Over the course of a few days, Frigon prepared a written response to the comments, gave it to Green, and resigned. Five months later, she filed suit, alleging breach of the covenant of good faith and fair dealing, constructive discharge, slander, and negligent or intentional infliction of emotional distress. District Court granted summary judgment in favor of the defendants, and Frigon appealed.

Although Frigon was not fired, she said the defendants had breached the covenant of good faith and fair dealing by refusing to give her performance and salary reviews, as stipulated in policy, and by denying the merit raise on the basis of negative and partially false comments. The Supreme Court didn't buy her argument: "Breach of the covenant of good faith and fair dealing was established as a tort separate from wrongful discharge, but applicable only in cases of employee termination." Since Frigon voluntarily resigned, she had no grounds for breach of the covenant. Had Frigon been able to make a case for constructive discharge, as she alleged, she might have been able to show a breach. But the Court rejected her argument that constructive discharge might have occurred: "Even assuming that [Frigon] correctly states the test for constructive discharge in Montana, the facts do not support her argument."

Frigon also argued that oral and written comments by Enright and Larsen were defamatory. The Court examined the test for defamation and concluded that "there is no evidence to support a holding that [their

comments] disgraced or degraded [Frigon] as a matter of law." "Furthermore, a basic tenet of the law of defamation is that an expression of opinion is generally not actionable. ... The facts relied on by [Frigon] to show defamation instead reflect opinions rendered in the context of the evaluation of her performance on the job."

The final issue involved emotional distress. First, the Court pointed out that "[e]motional distress under Montana law has been and remains primarily and element of damages rather than a distinct cause of action." However, the Court examined Frigon's arguments and concluded, "There is no evidence in the record ... which would support a claim for intentional infliction of emotional distress. The comments made by Enright and Larsen, and the failure of Morrison-Maierle to give [Frigon] a raise are hardly instances of conduct that goes 'beyond all possible bounds of decency.' Nor has [Frigon] presented facts showing a substantial invasion of her legally protected interests. The law has yet to protect a person's interest in receiving a merit raise."

The Court affirmed summary judgment. So, not only did Frigon "lose the lawsuit," she also had to abide by a part of the judgment that required her to pay the costs of litigation (up to summary judgment) to Morrison-Maierle.

Oedewaldt v. J.C. Penny Company, Inc. (1988, federal) — ***tort, covenant*** *687 F. Supp. 517*

This is a Memorandum and Order from Federal District Court regarding a lawsuit filed by Gisela Oedewaldt against J.C. Penney Co. The court ruled on summary judgment requested by Penney on two main issues: workers' compensation exclusivity and constructive discharge.

Oedewaldt worked at the Penney store in Shelby. She alleged that, beginning in 1974, the manager, Kenneth Pitcock, engaged in actions toward her that eventually led to her nervous breakdown and loss of her job in 1985. Normally, when a worker is injured at work due to negligence or accident, workers' compensation is the exclusive remedy for compensation; "common law damages are not available for injuries negligently or accidentally inflicted by an employer." The court granted summary judgment in favor of Penney for claims based on negligence.

However, Oedewaldt also alleged *intentional* conduct by the manager caused her injury. If proven, such conduct — and the resulting injuries — would not fall under workers' compensation. The court granted Oedewaldt the opportunity to amend her claim to include intentional infliction of emotional distress, with the facts to be decided at trial.

Oedewaldt also alleged wrongful discharge and breach of the covenant of good faith and fair dealing. Penney argued that no discharge or forced resignation occurred, so her claims must fail. Oedewaldt countered that she was "constructively discharged" as a result of Pitcock's actions. The court stated, "Constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. To find constructive discharge, the court determines whether or not a reasonable person in the employee's position and circumstances would have felt compelled to resign."

"No decision of the Montana Supreme Court expressly states that Montana recognizes the concept of 'constructive discharge,'" the court continued. However, the court acknowledged that the Montana Supreme Court had "discussed" the issue in at least one previous case. The federal court's conclusion was "that if presented with the question at issue here, assuming the truth of [Oedewaldt's] factual allegations, the Montana Supreme Court would undoubtedly hold the concept of 'constructive discharge' applicable to her action ..." So the court denied summary judgment on the issue of wrongful discharge and breach of the covenant of good faith and fair dealing, sending the case to trial.

Rupnow v. City of Polson (1988) — ***tort, covenant, public policy*** *234 Mont. 66, 761 P.2d 802*

This appeal contested a summary judgment upholding the discharge of a probationary police officer in Polson. William Rupnow began work as police officer in July 1985. He was to be on probation for at least one year. His supervisor, Ronald Buzzard, told Rupnow that the probationary period "shouldn't be a problem for him," in light of Rupnow's past experience. In September 1985, Rupnow received a satisfactory performance evaluation. In January 1986, he received a second evaluation, which noted some areas needing improvement. Rupnow refused to sign the second evaluation and filed a protest with the mayor. In March 1986, the City fired Rupnow, stating the reasons to him in a meeting and following up with a letter.

Rupnow sued, alleging wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence. District Court granted summary judgment to the City, and Rupnow appealed.

On the allegation of wrongful discharge, the Supreme Court said, "To successfully maintain the tort of wrongful discharge, a plaintiff must show that the defendant violated a public policy." Rupnow asserted that the city did not follow its progressive discipline policy: 1) oral warning, 2) written warning, 3) suspension, and 4) dismissal. The Court noted that the same policy states, "It should also be understood that, depending on the nature and circumstances of the violation, the authority in charge may use any disciplinary measure appropriate within their judgment." The City maintained that it used alternative measures, allowed under policy, through oral warnings and written evaluations. The Court agreed and upheld summary judgment on the public policy claim.

With regard to the covenant of good faith and fair dealing, the Court acknowledged it existed for probationary employees (see *Crenshaw, page* 14), provided the employee could show "objective manifestations" of job security. Rupnow said that the two evaluations and Buzzard's statement that the probationary period shouldn't be a problem for Rupnow established objective manifestations. The Court disagreed, saying that these events did not establish job security. Rupnow also said failure to follow the progressive discipline policy breached the covenant, but the Court had already disposed of that argument. Finally, Rupnow disputed that he had been warned that his probationary status was in jeopardy. While the Court acknowledged that this was a factual dispute, it said, "Oral warnings that an employee's probationary status is in jeopardy are not mandatory." Considering all the evidence, the absence of the warnings, if true, would still not bar summary judgment.

Finally, Rupnow's negligence claim was based in part on the City's failure to follow the progressive discipline policy. Irrelevant, said the Court, as the issue was already decided. Rupnow also said Buzzard was negligent in failing to adequately investigate certain allegations against Rupnow. The Court concluded, "Chief Buzzard obviously did not conduct an investigation to Rupnow's satisfaction; however, Rupnow does not bring forth evidence to raise a genuine issue of material fact that Buzzard was negligent in his investigation." The Supreme Court affirmed the summary judgment in toto.

Barrett v. ASARCO Incorporated (1988,"Barrett I") — ***tort, covenant*** *234 Mont. 229, 763 P.2d 27*

This is a complex case that resulted in a new trial and another appeal (see page 68). At issue was what evidence and testimony may be allowed to establish the "character" of the discharged employee. In addition, the Court expanded its interpretation of the covenant of good faith and fair dealing, saying that the obligation is binding on the employee as well as the employer.

Robert Barrett worked for ASARCO for 15 years, 10 of those as a foreman. In November 1983, he injured his back at work. While Barrett was on leave for his injury, ASARCO paid his full salary and covered his medical expenses. He never returned to work. In May 1984, ASARCO confronted him with a report that he had been seen unloading hay bales while still on disability leave. Barrett denied it, and ASARCO fired him for lying about his physical activities. A year later, Barrett filed suit, alleging breach of the covenant of good faith and fair dealing.

Prior to trial, but shortly after the deadline for completion of discovery, ASARCO learned the names of six witnesses who might have had information about other incidents of Barrett's dishonesty during his employment. After a series of legal maneuvers and shortly after the trial began, District Court ruled to exclude this evidence. The jury returned a verdict in Barrett's favor, awarding $338,000 in compensatory damages and $75,000 in punitive damages.

A week after the end of a trial, a woman contacted ASARCO, claiming to have information that contradicted the verdict. The woman's name had come up during discovery, but Barrett had omitted her name as a person with knowledge relevant to the case. She met with ASARCO and signed a statement about a conversation and activities Barrett engaged in while on disability leave. Armed with this new information, ASARCO moved for a new trial. District Court denied the motion, and ASARCO appealed on the basis of both the prior excluded evidence and the new information.

The Supreme Court addressed each of the reasons that District Court had excluded evidence at the beginning of the trial. A number of legal issues came into play; in a nutshell, the Supreme Court held that the District Court should not have excluded the evidence. The Court said the nature of the excluded testimony "directly pertains to the issue of Barrett's honesty with his employer" and is "thus relevant to ASARCO's defense that it terminated Barrett for dishonesty."

In the *Flanigan* case (see page 18), the Court had ruled that evidence acquired after termination may not serve as additional reasons for the termination. In this case, though, the Court said, "After-acquired evidence, however, may be introduced if relevant to the character of a party when that character is an essential element of the defendant's original defense." The Court reasoned that ASARCO did not seek to introduce the evidence as additional reasons justifying termination, but as evidence of Barrett's character that strengthens ASARCO's defense that Barrett lied about his hay-lifting activities.

"Further," the Court said, "alleged evidence of previous incidents of dishonesty would be relevant to the issue of whether an employee has a reasonable expectation of job security and thus may claim the protection of the implied covenant of good faith and fair dealing." Emphasizing that "the covenant of good faith and fair dealing mandates a reciprocal duty," the Court said, "an employee who breaches his or her duty of good faith and fair dealing may not then complain of unfair dealing by the employer." Therefore, "Barrett cannot claim that ASARCO's alleged sudden, 'underhanded' termination decision was a breach of the covenant of good faith and fair dealing if Barrett himself failed to deal honestly in his job performance with ASARCO." Consequently, evidence of Barrett's alleged misconduct "is relevant to a determination of whether Barrett dealt with ASARCO in good faith."

Having thus disposed of the case and remanded it for a new trial, the Court declined to discuss the issue of the evidence that came to light after the first trial. (This case resulted in another appeal, summarized on page 68.)

Daly Ditches Irrigation District v. National Surety Corporation (1988) — ***tort, damages***
234 Mont. 537, 764 P.2d 1276

In this case, an employer sued its insurance company for refusing to defend the employer in a wrongful discharge case. Daly Ditches Irrigation District was the employer, which had been sued by a terminated employee. When Daly Ditches tendered the suit to National Surety, the latter refused to take on the case. At issue was the policy wording, which provided coverage for "bodily injury or property damage ... caused by an occurrence ..." Occurrence was defined as "an accident ... neither expected nor intended from the standpoint of the insured."

Daly Ditches argued that breach of the covenant of good faith and fair dealing fell under the definition of "occurrence." It contended that the consequences of the termination were neither expected nor intended.

Surety responded that discharge from employment was not an "accident" under the policy language. The Supreme Court recognized that "an intentional act may nevertheless constitute an occurrence where the alleged injuries were not the expected or intended result of the insured's intentional conduct." "However," continued the Court, "the alleged intentional conduct of Daly could be expected to cause the injury claimed by the employee. The allegation is that Daly fired the employee for refusing to violate Montana law. Damages for emotional and mental suffering may be expected to flow directly as injuries from such a discharge."

Daly Ditches also argued that Surety relied only on the employee's legal complaint, and thus failed its duty to investigate the possible claim. The Court disagreed: "[t]here is no evidence that Surety failed to properly investigate the claim at issue. Surety inspected the allegations of the complaint and determined that the employee sought damages flowing from intentional conduct" by Daly Ditches. Thus, the Court sided with Surety that it had no obligation to defend Daly Ditches under the terms of the policy. The case points out that employers need to seek specific coverage for liability stemming from discharge. Such a rider undoubtedly raises the cost of liability insurance.

Bestwina v. Village Bank and Richard Olson (1989) — ***tort, statute of limitations***
235 Mont. 329, 767 P.2d 338

This case revolved around circumstances for "tolling" (suspending) the statute of limitations for a claim. Lawrence Bestwina worked as vice-president at the Village Bank in Great Falls. In March 1977, he began psychiatric treatment for depression. In November 1977, he was discharged from his job. A couple months later, he was hospitalized for depression, and his condition continued to deteriorate.

A wrongful discharge claim was filed in October 1985, with Bestwina's wife acting as guardian. The suit was filed nearly eight years after the discharge, and the statute of limitations for tort claims is three years. The defendants moved for summary judgment, saying the statute of limitations had run and the suit was untimely filed. Bestwina said the statute of limitations should be tolled for the period of his mental illness. In addition, Bestwina claimed that the defendants fraudulently concealed the real reason for the termination until October 1983; therefore, the statute of limitations would not have begun until then. District Court granted the defendants' motions for summary judgment.

In considering Bestwina's appeal, the Supreme Court pointed out that a disability, such as mental illness, may toll the statute of limitations. Defendants had contended that Bestwina had pursued social security benefits and workers' compensation during the time of his "disability," and these actions served to show his competence. The Court said, "While we recognize that Mr. Bestwina's pursuit of these claims is certainly proper for consideration on the issue of mental illness, we conclude that the pursuit of the claims does not conclusively establish an absence of serious mental illness." Given all the evidence on record, the Court concluded that "there is a material issue of fact precluding summary judgment." The District Court was instructed to determine the periods of Bestwina's disability, and "the total of such time shall not be counted" within the statute of limitations.

On the issue of fraudulent concealment, Bestwina pointed out that Richard Olson underwent deposition in 1983. It was only at that time that Olson stated that Bestwina had, in fact, been fired because of a personal matter between the two men. Bestwina wanted the Court to agree that the statute of limitations on fraudulent concealment commenced when Olson made his deposition. The Court refused to extend the "discovery doctrine" to cover this case. That claim was thus excluded from further proceedings.

Mahan v. Farmer's Union Central Exchange (1989) — ***discrimination*** *235 Mont. 410, 768 P.2d 850*

This appeal concerned a number of legal issues involving selection of jurors and admission of evidence and testimony. The outcome was a four – three decision, reversing and remanding for a new trial.

Wayne Mahan worked for Cenex for 30 years. By February 1983, he was head development engineer at the firm's refinery in Laurel. At that time, his employment was terminated in what Cenex called a reduction in force. He was then 60 years old. Mahan complained to the Montana Human Rights Commission of age discrimination by Cenex. The HRC investigated the case and made a preliminary report in August 1984. By October 1984, the case had been pending before the HRC for over a year, and at Cenex's request, the HRC issued a "right to sue" letter. Mahan then filed suit, adding breach of the covenant of good faith and fair dealing to his age discrimination claim.

During jury selection, Mahan's lawyer challenged two jurors "for cause." Both challenges were denied by the District Court judge. The lawyer then had to use all his peremptory challenges to exclude the two jurors when, in fact, he would have used them against other selected jurors. Upon examination of the transcript, the Supreme Court held that the District Court had erred in denying the challenges for cause. Thus, it ordered a new trial.

The Court dealt with several other issues as well. At trial, both sides used statisticians to debate the claim of age discrimination. The Court emphasized that these experts, on re-trial, could testify only "that their statistical tests show or do not show patterns of discrimination based on age, but may not testify to the ultimate conclusion that age discrimination" occurred in Mahan's termination.

During the first trial, Mahan had claimed that the company retaliated against him for suing; it refused to provide a letter of reference and did not include him in company and employee functions. (The HRC investigation had also indicated that Cenex had refused severance pay after Mahan filed his complaint.) The Court noted that such retaliation for filing a complaint with the HRC is prohibited by law. Further, the retaliation "might possibly be considered evidence of bad faith in the original termination as well as in the retaliation. [Mahan] was therefore entitled to instructions to the jury based on his claim of retaliation."

The Court examined other issues of admissible testimony. Primary among these was its agreement with District Court that the HRC compliance officer could not be allowed to testify about his investigation of Mahan's discrimination complaint. District Court had also excluded the HRC's written report of "reasonable cause." The Court examined both the federal and Montana rules of evidence and concluded, "The very investigation information that the federal rule allows is specifically excluded in the Montana rule." This holding prompted a detailed dissent by Justice Sheehy, who thought that either the report or the testimony (or both) should be allowed as "an aid to the jury."

On one other issue, the Supreme Court affirmed District Court's action in excluding evidence offered by Mahan regarding the Cenex's management (or mismanagement) of the refinery. However, the Court did agree that Cenex could offer evidence of the need for its cost containment program that led to the reduction in force affecting Mahan.

Prout v. Sears, Roebuck and Company and McGinnis (1989) — ***tort, covenant***
236 Mont. 152, 772 P.2d 288

Tammy Prout began working for the Helena Sears store at the age of 16 in 1979. Her employment application contained the following statement, in part: "[M]y employment and compensation can be terminated with or without notice, at any time, at the option of either the company or myself." She also signed a personal record card that stated, "In consideration of my employment, I agree to conform to the rules of Sears, Roebuck & Co. and my employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either the company or myself."

After two years, Prout received a promotion and a raise. In January 1983, she became a supervisor and received a large raise. The company agreed that Prout was promoted "because her supervisors were generally satisfied with her job performance." During Prout's seven and one-half years with Sears, the store

changed managers five times. At least three of the managers gave Prout evaluations that noted problems with absenteeism and tardiness. In December 1986, the then-manager, Terry McGinnis, fired Prout for falsification of two payroll time sheets.

Under Sears's payroll system, employees were to report their hours for the full week every Thursday. If an employee were scheduled to work Friday and/or Saturday, he or she would report those hours, even though they hadn't yet taken place. If those hours were not worked, the employee was supposed to teletype corrections to the central payroll office. Prout and two other employees said it was acceptable practice under two prior managers to forgo the teletyped corrections and, instead, "make up" the reported hours as compensatory time the next week. McGinnis and other employees disputed this. The weekly time sheets contained the statement, "I have recorded my actual starting and quitting time each day. Any falsification will subject me to immediate dismissal."

Prout filed suit against Sears and McGinnis. Plaintiff and defendants agreed that several issues were to be litigated at trial. However, the defendants moved for summary judgment, and District Court granted it, saying,

> "The sole issue decided by the Court is that plaintiff's claims are precluded as a matter of law by the language of the plaintiff's employment application and her personal record card. That language in clear and unequivocal terms notified plaintiff that her employment could be terminated at any time and for any reason, and defeats the claims plaintiff is attempting to assert in this case."

Prout appealed to the Supreme Court. The result was a lengthy opinion that reversed summary judgment. The Court examined the tort exceptions to at-will employment in Montana and noted that Prout's discharge preceded enactment of the wrongful discharge statute. In this case, the Court said, the parties signed a pretrial order "listing what the parties considered eight issues of fact remaining to be litigated." The Court concluded, "These must be resolved to determine whether [Prout's] claims fall into any of the four exceptions to the right of the at-will employer to discharge its employees. This precludes summary judgment."

"At the same time," the Court continued, "we give effect to the employment application and record card. These give the employer the right to fire without cause. They do not give the employer the right to fire for a false cause. If the at-will employer who can fire without cause ... chooses instead to fire an employee for dishonesty, the discharged employee must be given the opportunity to prove the charge of dishonesty false."

Justice Weber filed a lengthy dissent in this case. Besides offering a history of the at-will doctrine, he cited to a 1988 landmark case in California (*Foley v. Interactive Data Corp.*). In essence, the California decision barred punitive damages for breach of the covenant of good faith and fair dealing, saying that the breach should be dealt with only in the context of contract damages. Weber noted that Montana may be the only state that allows breach of the covenant as a distinct tort, but concluded that breach of the covenant "allows recovery only of contract damages and that punitive damages are not recoverable." In Prout's case, Weber would agree with the District Court's conclusion that the specific language of her "contract" with Sears precluded any claims by Prout in the absence of a violation of public policy.

Niles v. Big Sky Eyewear, Vainio, and Vainio (1989) — ***tort, covenant, damages***
236 Mont. 455, 771 P.2d 114

The defendants in this case include a professional corporation and two brothers, Leonard and David Vainio, who are partners in the corporation. They will be referred to as "Big Sky." Janice Niles began working in Big Sky's Bozeman store in November 1984. By April 1986, she had received several raises and was manager of the store. Sometime that month, Niles fell under suspicion of taking money from the till, based on a supposed allegation by another employee. Two corporation officers went to the police, who at-

tempted a "sting," purchasing an item at the store with marked bills. Based on what the officers saw and what they had been told, they arrested Niles that day for misdemeanor theft.

After her arrest, Niles did not return to work at the store. Leonard Vainio promoted his girlfriend to manager. The misdemeanor charges were dropped when Big Sky failed to provide the records to support prosecution. Niles had to go to a great deal of trouble to secure her final paycheck from Big Sky. She sued for defamation, negligent infliction of emotional stress, wrongful termination, and breach of the covenant of good faith and fair dealing.

At trial, several former Big Sky employees testified that Niles was a good and respected employee. Testimony also indicated that Big Sky was shoddy and haphazard in handling money and keeping books. The employee who supposedly had fingered Niles emphatically denied that she had ever reported her to L. Vainio. Niles presented evidence of emotional and economic suffering resulting from the ordeal. The jury returned a verdict in her favor and awarded $470,000. Following the verdict, both sides appealed on several issues. We will discuss only a few.

The defamation claim in Niles's suit was based on Big Sky's report to the police. Big Sky asserted that the claim should not have been allowed, as a qualified privilege exists for a statement made by an employer about an employee for the protection of a lawful business. The Supreme Court pointed out that "the qualified privilege is waived if it is abused." Substantial evidence on the record indicated that L. Vainio had made his statements "without good faith," thus negating the qualified privilege.

Big Sky also claimed that Niles's claim of wrongful termination didn't hold water: she had not been fired. The Supreme Court said that "a doctrine of constructive discharge has been recognized in Montana." Based on that doctrine, the Court said, "No speculation is required for the jury to conclude that when an employer causes the arrest of his employee ... that the employee has been constructively fired. It defies human experience to believe that Niles would reappear for work the next workday following her arrest."

Another issue on appeal was "comparable employment." It referred to Big Sky's offer to re-employ Niles; District Court excluded that offer from evidence. Rather than standing as evidence that would aid in Big Sky's defense, the offer was part of "compromise negotiations" — an attempt by Big Sky to stave off litigation. The fact that the offer was made after Big Sky had already received a draft of the complaint — although before the suit was filed — led to that conclusion by the Court.

Finally, Big Sky appealed Niles's claim of negligent infliction of emotional distress. The Supreme Court said, "Where there is evidence of substantial invasion of a legally protected interest which causes a significant impact upon the person of the plaintiff, emotional distress is compensable without showing of physical or mental injury." In summary, the Court upheld the trial verdict on all issues.

Hobbs v. Pacific Hide and Fur Depot (1989) — ***tort, covenant*** *236 Mont. 503, 771 P.2d 125*

This is another case the Supreme Court sent back for retrial after finding errors in the original trial. Here, the errors centered once again on the nature of the implied covenant of good faith and fair dealing.

In the fall of 1978, Roger Palmer interviewed Clifford Hobbs for a job with Pacific Hide and Fur. According to Hobbs, Palmer painted a glowing picture, saying Hobbs would have a bright future and job security with Pacific. These statements, along with other promises, induced Hobbs to move from Denver to Great Falls to become Pacific's director of corporate purchasing in December 1978.

Unfortunately, Palmer and Hobbs did not get along well. Still, Hobbs was promoted in August 1980, overseeing a branch of Pacific while still running purchasing. Apparently, though, his pay was less than that of other branch managers. And while other managers reported to the president or vice president of Pacific, Hobbs had to report to Palmer, who continued to be disruptive. At one point, Palmer was discip-

lined and removed as Hobbs's supervisor, but became his supervisor again a few months later. Other managers reported having trouble with Palmer.

In April 1981, the branch management duties were taken from Hobbs; he still directed purchasing, under Palmer's supervision. In September 1981, Pacific fired Hobbs without prior notice. At that time, Pacific's president circulated a letter to other managers saying Hobbs had not worked out as branch manager but had done an excellent job in purchasing. The letter went on to say that the conflicts between Hobbs and Palmer "should now be resolved." Eight months later, Pacific fired Palmer, apparently because of unresolved conflicts with other managers.

Hobbs sued, claiming actual fraud, constructive fraud, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. The case went to trial in 1984, and the jury found against Hobbs on all claims. He appealed on four issues, and the Supreme Court granted a reversal on one of the four issues and partially agreed with Hobbs on one other issue.

The reversal focused on the instructions the District Judge gave to the jury relating to the covenant of good faith and fair dealing. The Court said the instructions were "inadequate, confusing and misleading." The Court reviewed its past pronouncements on the covenant and studied the two instructions given by the District Court. "Taken together, the court's instructions failed to tell the jury the nature and extent of the implied covenant of good faith and fair dealing." The Court then offered a suggested instruction regarding the covenant; the concluding paragraphs of these instructions would state:

> "In determining whether the defendant violated the duty of good faith and fair dealing, you must balance the interest of the defendant in controlling its work force with the interest of the plaintiff in job security. ...
>
> "Thus, if the employer is motivated to discharge the employee for reasons unfair or not honest, the employee is entitled to recover damages proximately caused by the breach. On the other hand, if the employer was motivated by honest business reasons in discharging the employee, the employer had the right to terminate the employment ..."

Another issue dealt with information exchanged during discovery. Since one of the reasons Pacific gave to Hobbs regarding his dismissal was difficult economic times, Hobbs had requested income tax records of the company from 1979 through 1982. The Court agreed these records could be used as evidence. At trial, Hobbs's financial expert had been cross-examined by Pacific regarding information that apparently had not been made available during discovery. The Court directed that "information that may be used by either party in direct or cross-examination of witnesses must be supplied in accordance with the request for production" during discovery.

Hobbs also contended that District Court had improperly instructed the jury on constructive fraud. However, the Supreme Court said Hobbs's "theory or basis for constructive fraud [was] not properly conceived in this case." Hobbs had cited statements made by Palmer during the employment interview that Pacific was a "gold mine" and the job was the "opportunity of a lifetime." The Court said, "Such statements are not the source of [Hobbs's] problems ... nor are they demonstrably false. The statements may arguably have given rise to justifiable expectations in Hobbs about his employment, but they do not constitute a basis for constructive fraud."

Justice Weber dissented. He delved into the record to review "substantial evidence to support the conclusion of the jury" that Hobbs should have been terminated. He also said the instructions to the jury on the covenant were "a fair statement of the law as it existed and was available to the trial judge and attorneys during the 1984 trial." Weber also noted that "almost 8 years have passed since the date of termination and 5 years since the trial. We are posing a difficult trial problem ... by the present reversal."

Gentry, Damon, and Gleich v. City of Helena and the Police Commission of the City of Helena (1989) — ***statute*** *237 Mont. 353, 773 P.2d 309*

This case did not involve any tort claims relating to discharge; rather, it was a continuing "judicial review" of an administrative decision. The three plaintiffs were Helena police officers who had been charged with misconduct. Under statute, they had a hearing before the Helena Police Commission. The Commission imposed 90-day suspensions on Gentry and Damon and a 30-day suspension on Gleich. The Helena city manager modified the Commission's decision and fired all three.

The officers petitioned in District Court for judicial review of the actions. When District Court upheld the decision, they appealed to the Supreme Court. The Court determined that all the proceedings had gone according to statute, including the city manager's decision to modify the Police Commission's disciplinary action. The Court then said that the principal issue on appeal was "whether substantial evidence supports the decision of the Police Commission as modified by the City Manager."

Under the law and previous decisions, the Court said, "[t]he findings of the Commission are final and conclusive and supported by substantial evidence." In addition, it is not up to the courts "to determine penalties, sanctions or disciplinary measures that may be taken against a police officer." The Court determined that "substantial evidence on the whole record does support the findings and conclusions of the Helena Police Commission, and the decision as modified by the City Manager."

With that out of the way, the Court addressed other issues raised by the plaintiffs. Most of the matters were technical in nature, and Court did not find reversible error in any aspect of how the case was handled or the hearing conducted. Final among the issues was the officers' contention that the discipline (discharge) was disproportionate to the misconduct. The Court simply said that such discipline was up to the Commission and city manager. "[T]hat kind of decision relating to the personnel of the city is beyond our reach and jurisdiction."

Peterson v. Great Falls School District No. 1 and A (1989) — ***tort, legislative immunity*** *237 Mont. 376, 773 P.2d 319*

*(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

With this decision, the Supreme Court reaffirmed and "expanded" its view of legislative immunity under § 2-9-111, MCA (see *Barnes* and *Bieber*, above). The Court upheld District Court's summary judgment in favor of the school district because of legislative immunity.

Vicki Peterson worked as a custodian for the Great Falls school district. In May 1984, she was fired. She alleged that the basis of her termination was her refusal to empty 55-gallon trash drums into a dumpster. According to Peterson, she had asked that her job duties be changed so she wouldn't have to empty the barrels. The District refused, telling her to get help in handling the containers. When she still refused to "manhandle" them, an administrative assistant fired her. Peterson contended in her complaint of wrongful discharge that requiring her to empty the barrels created an unsafe workplace and violated a Great Falls city ordinance banning the use of 55-gallon barrels for trash.

In her appeal, Peterson said the discharge was an administrative, rather than legislative, action and was thus not covered by the statutory immunity. The Court said, "While the title of the statute infers that the immunity granted is for legislative acts or omissions, the actual language employed in defining and granting the immunity is much broader." The Court agreed with District Court that "the action of the legislative body need not be legislative in order to afford immunity."

"The statute," continued the Court, "clearly extends immunity coverage to school districts, to the school boards governing those school districts and to agents of those school boards." Although an administrative

assistant fired Peterson, he brought the decision before the board at its next meeting, and the board ratified the decision. The immunity also applies to actions by "agents" of the legislative body. Here, the Court said, the administrative assistant was the agent, and the action was ratified by the board.

Peterson also contended that the immunity statute violated her fundamental right to full legal redress under the Montana Constitution. The Court disposed of this argument under the precedent set in the *Bieber* case: "The statute has previously passed [the] rational relationship test and we find that Peterson's argument of unconstitutionality must fail."

Justice Sheehy dissented, saying the majority decision was "an incorrect reading of the statute." It was his opinion that "the intent of the legislature was to grant immunity for legislative action by a legislative body, and no more." In expanding his viewpoint, Sheehy said, "A body acts legislatively when it sets policy, or adopts regulations for the enforcement of its policies. Beyond that, the entity or its agents are acting administratively and should not come within the ambit of legislative immunity."

Sheehy also discussed the constitutional issue of access to the courts and full legal redress. He concluded, "It is enough to say here that in my view § 2-9-111, MCA, carried to the extent decided by the majority in this case, violates Article II, Section 16 in every particular." Justice Hunt also dissented, saying "*Bieber* does not grant ... immunity to a member of the government who is not also engaged in legislative functions."

Keller v. School District No. 5 and Ed Argenbright (1989) — ***due process*** *237 Mont. 481, 774 P.2d 409*

This case concerns judicial review of administrative proceedings, specifically regarding non-renewal of a teacher's contract. It bears some relationship to the 1984 *Bridger Education Association* case (see page 12).

In April 1987, Rose Keller was informed that her teaching contract would not be renewed for the next school year. The letter she received gave no reasons for the termination, but the school board minutes indicated that all the nontenured teachers had been terminated for financial reasons. Keller relied on those minutes and did not request a specific statement of reasons, as allowed under statute (§ 20-4-206(3), MCA).

After the passage of a mill levy in June 1987, the board voted to extend contracts to all the laid-off teachers, with the exception of Keller. In July, she appealed her termination to the County Superintendent of Schools. Her appeal was dismissed on the basis that it had not been filed within 30 days of the April notification on nonrenewal, as required by administrative rule. The State Superintendent of Public Instruction upheld this decision, but District Court reversed it.

When the Supreme Court reviewed the case, it noted simply that Keller had not requested the reasons for termination within 10 days of notification, nor had she appealed the nonrenewal within 30 days of notification. Keller claimed special circumstances merited an exception to these limitations. First, because of the resolution of the school board that "financial conditions" necessitated laying off nontenured teachers, she did not file a specific request for reasons. Anyway, the board need not have provided a response to such a request, as § 20-4-205(4), MCA says that no reasons need be given "when the financial condition of the school district requires a reduction in the number of teachers ... and the reason for the termination is to reduce the number of teachers ..."

Secondly, Keller argued, she appealed the termination only after she was the sole teacher not re-hired. The board's action indicated that its reasons had changed, and therefore, "financial conditions" was no longer applicable. The Court, however, stuck to the time limitations and reversed the District Court decision. "Even in those cases where 'financial conditions' is the alleged reason for termination, nontenured teachers cannot assume this is the reason for termination unless they request ... written confirmation of the reasons for termination."

Justice Hunt dissented, implying that Keller was the victim of a Catch 22. She lost because she didn't ask for reasons on time, but had she asked, the board need not have provided any. She relied on the school board's resolution as reported in the minutes; Hunt wrote, "If a teacher cannot rely on a resolution of the school board, what can she rely on?"

Thompson v. Board of Trustees of School District No. 2, Yellowstone County (1989) — *due process* *237 Mont. 498, 774 P.2d 412*

In this case, the Supreme Court again undertook a review of administrative proceedings involving a teacher. The case follows a complex procedural path that began in March 1983, when the school board voted not to renew Roger Thompson's contract as choir teacher at Billings West High School. The board notified Thompson by letter, which stated in part, "School District No. 2 would be better served by another teacher in this position."

Thompson responded with a letter requesting the specific reasons for termination and also requesting a hearing before the board. The board wrote back, saying its first letter "included the reasons for the termination ..." but granting an "appeal." After the appeal, the board voted again to terminate Thompson's employment. It never provided any additional reasons, either in writing or orally.

Thompson appealed to the County Superintendent, who dismissed the appeal as not being properly presented in accordance with administrative rules. Thompson took no further appeal. At the same time, though, he was pursuing a grievance under the union contract. His grievance did not contest the sufficiency of reasons given by the board. The grievance was denied at the first two levels. His next choice was to go to arbitration, but the union no longer backed him at this point. Thompson did not proceed with his grievance; instead, he filed a tort claim in District Court in June 1983, alleging tort liability, violation of due process, and breach of the covenant of good faith and fair dealing.

In March 1988, District Court granted partial summary judgment to both sides. Although legally complicated, the order in essence said Thompson had no claims against the school district except that it had to provide him with specific reasons for nonrenewal of his contract. Thompson appealed to the Supreme Court.

The Supreme Court held that Thompson's "own Grievance Report contradicts the basic assertion in [his lawsuit] where he complains that the notice was insufficient." Further, the Court said, "[w]e conclude that the grievance procedure ... is the binding method of disposing of the issues ..." Finally, "[b]ecause Mr. Thompson chose not to proceed to binding arbitration, that terminated any further rights with regard to the claimed grievance." The Court's concluded "[B]y failing to follow these contract provisions, Mr. Thompson has lost his right to obtain specific reasons for nonrenewal."

With regard to Thompson's tort claims against the district, the Court simply said, "As he failed to follow the appropriate administrative procedure, he is barred from making the same contentions" in his lawsuit. Thus, the Supreme Court affirmed summary judgment in favor of the district, and reversed the District Court's order that the school district had to provide specific reasons to Thompson.

Meech v. Hillhaven West, Inc., and Semingson (1989) — ***tort, WDEA, constitutionality*** *238 Mont. 21, 776 P.2d 488*

On June 29, 1989 — nearly two years after the Wrongful Discharge from Employment Act took effect — the Montana Supreme Court upheld the constitutionality of the Act in all respects. This landmark decision by a 4–3 majority overruled three previous decisions in which the Court had developed its interpretation that Article II, § 16, of the Montana Constitution guarantees a fundamental right to full legal redress.

The case came to the Supreme Court from Federal District Court in Great Falls. Russell Meech had filed an action in that court, seeking damages for wrongful termination, breach of the implied covenant of good faith and fair dealing, and intentional or negligent infliction of emotional distress. Hillhaven moved for a dismissal, saying that the Wrongful Discharge from Employment Act precluded Meech's claims. Meech responded by contending that the Act violated Article II, § 16, of the Montana Constitution. The federal court then certified two questions to the Montana Supreme Court:

> 1) Is the Montana Wrongful Discharge from Employment Act unconstitutional in that it serves to wrongfully deprive an individual for his or her right to "full legal redress" within the meaning of Article II, § 16?
>
> 2) Are those provisions of the Montana Wrongful Discharge from Employment Act which expressly prohibit recovery of noneconomic damages, and limit the recovery of punitive damages, violative of an individual's right to "full legal redress" within the meaning of Article II, § 16?

The Court responded, "We answer 'No' to both questions." The majority then undertook a lengthy opinion to explain its answer.

In explaining its "no" to the first question, the Court stated, **"The Act does not violate the fundamental right of full legal redress, because no such 'fundamental right' is created by Article II, § 16."** This holding reverses the interpretation the Court had established in cases from 1981, 1983, and 1986. In so doing, the majority examined "long-standing, fundamental principles of constitutional interpretation" and held that its reasoning in the previous cases had been "flawed." The Court also held that "no one has a vested interest in any rule of common law. Therefore, as a general rule, the legislature ... may alter common-law causes of actions."

Under this reasoning, while common law causes of action were previously available for discharged employees, the legislature has "the authority to expand or reduce claims and remedies at common law." In adopting the Wrongful Discharge from Employment Act, the legislature exercised this authority.

In answering the second question above, the Court said, **"The Act survives equal protection scrutiny because it is rationally related to a legitimate state interest."** This interpretation went beyond the scope of the question as certified and included "an analysis of the equal protection guarantee found in Article II, § 4, of the Montana Constitution." The Court thus reframed the question:

> "Do the limitations on the recovery of certain damages in the Act violate equal protection because the Act unconstitutionally burdens a class of claimants seeking damages for wrongful discharge?"

In order to discuss this question, the Court had to decide the "proper equal protection test" it should apply to the Act. Since it had already determined that no fundamental right of full legal redress exists, the Court said, "We determine that the proper level of scrutiny ... is provided by the rational basis test." (Note: The Court used the same test in upholding legislative immunity in the *Bieber and Peterson* cases above.) Using this test, the Court said, "We ... find that the Act's provisions on damages pass equal protection muster because the Act's disparate treatment of similar claims is rationally related to a legitimate state interest."

The Court agreed that unequal treatment of discharged employees could be a result of the Act, but a "legitimate state interest" could rationally justify that result. The Court interpreted the intent of the legislature in passing the Act to be "promoting the financial interests of businesses" in Montana. It was also the Court's opinion, based on precedent, that "to improve economic conditions in Montana constitutes a legitimate state goal." Further, the Court said, "[w]e also conclude that the Act relates rationally to promoting Montana's economic interests."

The Court broadly traced the development of the law regarding discharge:

"Until recently, the fundamental body of law governing available damages in the employment area has been contract law. Courts ... have expanded employers' liability by recognizing tort claims in the employment context. The legislature has now acted to reverse this trend by restricting damages for wrongful discharge."

The Court related this development (from contract law to tort claims back to contract law) to the legitimate state interest of limiting employers' liability in discharge cases:

"The Act's limitation on damages applies long-standing contract law in an attempt to solve this problem [of employer liability] by dictating a more objective measure of damages. Under the Act, employers benefit because their potential liability is made more certain. Meanwhile, employees' control over the manner in which they are discharged remains, in part, as a result of the Act's 'good cause' requirement. The Act, in making this trade, is in no sense irrational."

The Supreme Court was closely divided in this decision. Justice Sheehy wrote a stinging dissent, in which Justice Hunt concurred. Sheehy's dissent, which labeled the majority decision as possibly "the blackest judicial day in the history of the state," disputed the majority opinion point by point. His conclusion ...

"If Art. II, § 16 of the Montana Constitution does anything, it imposes upon the judiciary the duty to guard the state constitution. In its decision today, this Court sidesteps that duty and reverses not only the cases mentioned in the majority opinion but a long line of cases in the past 15 years that have established solid boundaries for employers and employees ... In yielding our duty to the vagaries of the legislature, we have disadvantaged a large portion of the Montana labor market in the guise of a better business climate. The Wrongful Discharge from Employment Act of 1987 is economically and socially regressive. The majority opinion is legally regressive. Because of the unwillingness of the majority to act properly in a constitutional case, regressiveness is the order of the day.

"I would hold the Wrongful Discharge from Employment Act of 1987 to be invalid on the basis that under an equal protection test it cannot meet even a rational scrutiny. The only basis for the Act that I can find is that as between business and the workers, the legislature discriminatingly prefers business. That is not a constitutional basis on which to found a statute."

Justice Harrison dissented on narrower grounds. He objected to "reversing so many cases this Court has previously decided." In particular, he would uphold the previous case that held "when a cause of action is grounded on statute the plaintiff has a fundamental right to full legal redress under that statute."

Although this case was argued in conjunction with *Johnson v. State of Montana & Ed Argenbright,* the opinion did not address the Johnson case. However, that action presented an identical challenge to the Wrongful Discharge from Employment Act, and the Court disposed of it in the decision immediately following.

Johnson v. State of Montana and Ed Argenbright (1989) — ***WDEA, constitutionality***
238 Mont. 215, 776 P.2d 1221

This case came before the Supreme Court at the same time as the *Meech* case (above). The issues were nearly identical, and the Court disposed of the case in a brief opinion.

Judy Johnson held a high-level job as deputy superintendent with the Office of Public Instruction. In July of 1987, just a few days after the Wrongful Discharge from Employment Act took effect, Ed Argenbright, the elected Superintendent of Public Instruction, dismissed Johnson from her position. She filed separate actions: a complaint with the Department of Administration on the merits of the discharge, and a lawsuit challenging specific sections of the Act. This decision concerns the latter.

District Court granted summary judgment to Johnson, declaring § 39-2-904 (remedies) and § 39-2-913 (preemption of common-law remedies) unconstitutional. The Supreme Court tersely stated, "*Meech* controls this case. Therefore, the decision of the District Court must be reversed."

"Other issues have been briefed on appeal ...," the Court continued. "These issues have not been ruled on by the District Court. Therefore, they are presented prematurely before this Court, and cannot be properly reviewed at this time." The Court remanded the case for further proceedings to fall under the stipulations of the Wrongful Discharge from Employment Act. The parties eventually settled out of court.

Coombs v. Gamer Shoe Company (1989) — ***tort, covenant*** *239 Mont. 20, 778 P.2d 885*

This lawsuit concerns the closing of the Carlson's Shoe Store in Great Falls, which resulted in the termination of all store employees. David Coombs had started working at Carlson's in 1977. In August 1986, the store manager told him that the store would likely close within a year; he also told Coombs that Gamer would try to find him a position, but made no guarantees. In April 1987, Gamer announced that the store would close by the end of the summer. They offered to keep Coombs on part-time until the actual closure, but he declined. When the store closed, all the employees lost their jobs.

Coombs filed suit, contending that his termination breached the implied covenant of good faith and fair dealing. (His termination in April 1987, preceded the effective date of the Wrongful Discharge from Employment Act.) Gamer management said Coombs was a loyal and satisfactory employee; Coombs said the company should have found a position for him, even though it had not guaranteed him a job. District Court granted summary judgment in Gamer's favor, and Coombs appealed.

Coombs contended two issues of fact precluded summary judgment: 1) Gamer's reason for eliminating his job may have been a pretext, and 2) because the company led him to believe it would find a job for him, it may have breached the covenant of good faith and fair dealing. The Supreme Court affirmed summary judgment, saying "In short, the record establishes that Gamers discharged Coombs for legitimate economic reasons." The Court concluded that "[n]o evidence of pretext exists in the record." Coombs had testified that Gamer made no promises or guarantees about continued employment; "[t]herefore, Gamers did not violate the covenant of good faith and fair dealing ..."

Karell v. American Cancer Society, Montana Division, Inc. (1989) — ***tort, covenant***
239 Mont. 168, 779 P.2d 506

This case also concerns the covenant of good faith and fair dealing, as the discharge took place before the Wrongful Discharge from Employment Act took effect. It is interesting, though, for the Supreme Court clarified the implied covenant with regard to expectations of job security and warnings of termination. Carol Karell began working as Division Program Director for the Montana American Cancer Society (ACS) in Billings in January 1986. During her year-long employment, she received three memos from officers of the national organization praising her work. She also received three critical letters from her immediate boss, Stan Weiczorek, the Montana ACS vice-president. Weiczorek fired Karell in January 1987.

In April 1987, Karell filed suit, alleging breach of the implied covenant of good faith and fair dealing and negligent discharge. District Court granted ACS's motion for summary judgment, and Karell appealed. She disputed the District Court's finding that the implied covenant did not exist in her employment with ACS. She also contested the court's finding that ACS had not negligently discharged her. ACS cross-appealed, contesting the court's rejection of its memorandum of costs as not timely filed.

On appeal, ACS argued that "no attending facts show that [ACS] gave Karell any reason to believe that her position was secure and, therefore, the implied covenant against bad faith never materialized." The Supreme Court agreed. The Court noted that Wieczorek had criticized Karell's job performance on several

occasions and had taken several remedial steps to improve her performance. "From these facts," the Court concluded, "it is difficult to see how any reasonable person could believe that their job was secure."

Karell argued that the laudatory remarks in the three memos from the national ACS constituted objective manifestations of job security. The Court disagreed: "Objective manifestations of job security must come from the employer." Noting that Karell worked for the Montana ACS chapter, not the national organization, the Court continued, "The employer has the exclusive right to hire and fire. The employer ... is the only one with the power to create job security." Therefore, "non-employer comments do not support an implied covenant of good faith and fair dealing."

Karell also cited a conversation between her and Wieczorek during a ski trip they took about a month before she was fired. She said her told her she "'had a wonderful future with the American Cancer Society and ... could go anywhere.'" The Court discounted this comment, saying "evidence must be substantial and material. Occasional compliments by an employer are not sufficient to establish a reasonable expectation of job security." Finally, Karell said Wieczorek never warned her that her job was in jeopardy. The Court stated, "Such warnings are not mandatory, but may be considered along with other evidence of objective manifestations of job security."

In short, the Court concluded, "[Karell's] evidence is distilled to one compliment from her employer and the fact that he did not threaten to fire her before doing so." This was not enough to establish the implied covenant of good faith and fair dealing. On the issue of negligent discharge, the Court noted that Karell presented no arguments on appeal, nor did she move for dismissal of the issue. Therefore, the Court affirmed summary judgment on the negligent discharge issue.

ACS's cross-appeal on the timely filing of its memorandum of costs represented a technical issue of dates and deadlines. The Supreme Court held that District Court had erred in its calculations and so reversed the lower court's dismissal of the memorandum.

P.W. Berry Company, Inc. v. Freese (1989) — ***discrimination*** *239 Mont. 183, 779 P.2d 521*

This appeal comes from a sex discrimination complaint filed with the Human Rights Commission that proceeded through District Court to the Supreme Court. At issue was the amount of back wages awarded by the commission.

Debra Freese worked briefly for Berry at construction on two occasions. In April 1984, she worked for three days as a pipe layer before Berry fired her. In August 1984, she worked another three days as a general laborer, including work as a pipe-layer; Berry fired her again. The Human Rights Commission concluded that Freese met the qualifications for both jobs, and both terminations constituted illegal discrimination on the basis of sex. It awarded $11,755.12 back wages, offset by $7,024.87 in Freese's earnings at other jobs; the net award was $4,730.25.

Berry's appeal contended that the commission should not have allowed testimony and an exhibit from a certain witness, since Freese had not listed the witness on her pre-hearing order. Berry also contended that the back wages were improperly calculated, for the construction job had not provided 27 days of pipe-laying work, but Freese had been awarded 27 days' worth of wages.

The Court disposed of the first argument by noting that Berry had listed the same witness on the pre-trial order, but had decided not to call her. "Berry could not have been surprised by the testimony of a person whom the employer had listed as one of its own witnesses." Therefore, the testimony and exhibit were proper. On the second argument, the Court noted that Berry had hired Freese the second time as a general laborer, not a pipe-layer. "The Commission therefore calculated the amount of days of availability for both types of labor [pipe-laying and general] and based its award of back pay on that number of days."

Berry contended that the commission had placed an improper burden of proof on the company to show that it could not have employed Freese for that number of days. However, under proper interpretation of federal case law, the Court noted, "once a charging party has established a prima facie case of discrimination and established ... the damages ..., the burden then shifts to the defendant to prove ... that a lesser amount is proper." Freese had established her case, so the Commission properly placed the burden on Berry to prove that the award was improper. The Court found that Berry failed to do so.

Gibson v. James Graff Communications, Inc. et al. (1989) — ***contract*** *239 Mont. 335, 780 P.2d 1131*

This is a complex contract case with a simple decision by the Supreme Court. At issue was whether the plaintiffs could be compelled to submit their contract dispute to arbitration. The plaintiffs were William Gibson, Jr., Inc. and William Gibson Jr., as an individual. The parties to the lawsuit had entered into contractual agreements in November 1980, establishing employment and partnership among Gibson, James Graff, and Sage Advertising of Billings. All three contracts contained similar arbitration clauses.

Graff and Sage terminated Gibson's employment in August 1984. For a few years, the parties tried to negotiate a settlement to Gibson's claim of wrongful termination. Early in 1987, a letter from the defendants to Gibson suggested settling the issue through binding arbitration. However, Gibson filed suit in August 1987. The defendants raised a defense of mandatory arbitration that would preclude litigation. The District Court agreed and granted summary judgment. Gibson appealed.

The Supreme Court noted, "The law is clear that if a contract falls within the ambit of the Federal Arbitration Act [FAA], then an arbitration clause found in that contract must be enforced." The contract would fall under the FAA if it involved a business engaged in interstate commerce. Sage Advertising conducted 95% of its business in Montana, but the remaining 5% involved Wyoming, North Dakota, and South Dakota. Gibson argued that 5% was too little to constitute interstate commerce. The Supreme Court disagreed, saying "the District Court correctly found that the FAA applied to the partnership and employment agreements and required enforcement of the arbitration clauses."

State, ex rel., First Bank System, First Bank West Great Falls, and Reichel v. District Court, Eighth Judicial District, and Pancich (1989) — ***summary judgment, supervisory control*** *240 Mont. 77, 782 P.2d 1260*

This case involves the discharge of Robert Pancich as president of First Bank West Great Falls. In 1983, an adverse federal report on the bank prompted John Reichel, regional director for the First Bank system, to fire Pancich on August 12, 1983. Prior to taking the action, Reichel contact four members of the bank's board of directors, recommending the discharge. On August 18, the board elected a new president. On September 15, the board accepted Pancich's resignation.

Pancich filed suit, alleging wrongful termination and breach of the implied covenant of good faith and fair dealing. Affidavits filed by the board members provided this tally: four discussed the termination with Reichel before it took place; three others had formed the opinion that Pancich should go; all nine voted August 18 to concur in Reichel's termination of Pancich's employment.

The bank moved for summary judgment; it was denied. The bank then asked the Supreme Court to take supervisory control over the case; it was denied. A year later, Pancich moved for summary judgment; District Court granted summary judgment on the issue of the bank's liability and set a trial date for determining damages. The bank appealed the summary judgment and again asked the Supreme Court to take supervisory control.

The Supreme Court took control. First, it vacated the summary judgment, saying the District Court had misapplied the law regarding summary judgment: "summary judgment is not a decision on the merits. A

denial of summary judgment is simply a decision that there are factual issues." When the District Court had denied the *bank's* motion for summary judgment, it had concluded that there were factual disputes. "If there were factual disputes," the Supreme Court said, "neither plaintiff nor defendant were entitled to summary judgment." Looking at the record, the Court concluded that several factual issues remained in the case.

The other issue the Court considered was whether supervisory control was appropriate. "This Court may accept supervisory control," it pointed out, "when due appeal is an inadequate remedy." It may also be used "in the nature of a summary appeal — a shortcut — to control the course of litigation in the trial court ... to prevent extended and needless litigation." Given this possible course of action and the nature of this case, the Court concluded that "the order of the District Court was manifestly incorrect and created problems sufficiently burdensome to the defendants [bank and Reichel] to require this Court to take supervisory control." With that control, the Court vacated summary judgment and sent the case back for further proceedings.

Three of the seven justices dissented. Justice McDonough "would deny the writ [of supervisory control]." He said the bank would have an adequate remedy through a normal appeal of the eventual outcome in District Court.

Justice Sheehy dissented at length on both issues. Primarily, he pointed out, the federal National Banking Act confers "at-will" status on an officer, such as Pancich was as president. However, the same law stipulates that only the bank's board of directors can fire an officer. "Any other kind of dismissal is against the law and gives rise to liability." When Reichel fired Pancich, said Sheehy, he "acted completely against a Congressional statute." All other issues then became moot. Sheehy would have upheld the summary judgment. Even if that were not the case, he continued, he would not have taken supervisory control, because "there is a complete, adequate, and speedy remedy by appeal." Justice Hunt concurred with Justice Sheehy.

Mitchell v. University of Montana, Bucklew, and Cotton (1989) — ***tort, covenant, legislative immunity*** *240 Mont. 261, 783 P.2d 1337*

This appeal focused on the legislative immunity granted under § 2-9-111, MCA (see the *Barnes, Bieber,* and *Peterson* cases above). However, that issue came into play only after a complicated series of events. *(NOTE: The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Sandy Mitchell is a certified public accountant who started working in the U of M controller's office in 1978. In October 1981, the controller, Kay Cotton, fired Mitchell. She alleged that the termination was unfair, a result of a long-standing feud between her and Cotton, exacerbated by their competition for the controller job. She appealed the termination through the University Grievance Committee, which found in her favor and recommended that she be reinstated.

Cotton reinstated Mitchell, placing her in a new and, according to Mitchell, more difficult job. In February 1983, Mitchell was again fired. This time, the grievance committee upheld the discharge. After exhausting her administrative remedies, Mitchell filed suit in March 1984, alleging a breach of the covenant of good faith and fair dealing.

The University moved for summary judgment, asserting 1) the defendants were immune from suit, 2) Montana law does not permit judicial review of the personnel decisions of the Board of Regents, and 3) the facts show they did not breach the implied covenant. In April 1989, the trial court denied summary judgment. In May 1989, the Supreme Court rendered the *Peterson* decision on the issue of legislative immunity. The defendants in this case then renewed their motion under the disposition of the *Peterson* case. This time, District Court granted the motion. Mitchell appealed.

The defendants argued that the Board of Regents, which controls U of M, is the legislative body of the University System, and that Neal Bucklew (U of M president) and Cotton are officers and agents of that legislative body. The Supreme Court disagreed: "The Board of Regents is not a 'local governmental entity given legislative powers by statute' and thus not a 'legislative body' ..." The statute protects only the Montana Legislature, local governmental entities, and school boards. "The Board of Regents is not a local governmental entity, thus no immunity is afforded by the statute in this case." With this decision, the case went back to District Court for further proceedings.

Joyner v. Onstad and Gallatin County (1989) — ***tort, covenant, summary judgment***
240 Mont. 362, 783 P.2d 1383

In November 1984, Gallatin County hired Jack Joyner as a jailer. In May 1985, he broke regulations by entering alone a female prisoner's cell. Sheriff Onstad suspended him pending investigation. After completing the investigation, Onstad fired Joyner.

Joyner appealed to the Department of Labor and Industry. Following a hearing, the department sustained the discharge. The Gallatin County County Commission voted to uphold the discharge. Joyner then filed suit, alleging wrongful discharge and breach of the implied covenant of good faith and fair dealing.

The county and the sheriff moved for summary judgment. When the motion came to a hearing, Joyner, representing himself, asked for another week to file a reply brief. Still, he didn't get it in on time. In fact, he never filed a response. District Court granted summary judgment to the defendants on the grounds that Joyner failed to oppose the motion. Joyner appealed.

The Supreme Court outlined the civil procedure rules for summary judgment. It emphasized that the party opposing the motion must specifically respond as to why summary judgment is inappropriate. "If he does not so respond," the rule states, "summary judgment, if appropriate, shall be entered against him." "Joyner," said the Court, "did not deny nor rebut the defendants' arguments. Joyner also did not set forth any facts showing that a genuine issue existed for trial." Joyner's day in court was short; summary judgment was upheld.

Buettner v. State of Montana, Dept. of Labor & Industry (1989) — ***tort, administrative claims*** *240 Mont. 389, 784 P.2d 906*

Duane Buettner's appeal concerned the dismissal of his lawsuit against the department. At issue was a sequence of actions by date:

1) on December 31, 1984, the department terminated Buettner's employment.
2) the 1987 Legislature passed a law requiring any claims against the state to be submitted to the Department of Administration before a lawsuit may be filed. The law took effect October 1, 1987.
3) on November 11, 1987, Buettner filed a tort action against the state, without first presenting his claim to the Department of Administration, as required by the new law.

Relying on the new law, District Court dismissed Buettner's tort action. He appealed, saying that his cause of action (termination) took place in 1984, long before the law took effect. Therefore, he argued, the law could not constitutionally apply to his situation. Then, when District Court dismissed his lawsuit, the statute of limitations on his tort action (three years) had expired, so even if he wanted to file a claim with the Department of Administration, he couldn't.

The Supreme Court agreed with District Court that the requirements of the new law were procedural. "The Legislature can impose procedural requirements on a plaintiff before [he] can file a complaint in court as long as the procedures do not impair any of [his] substantive rights." The Court said it might be

unfortunate that the statute of limitations had expired when Buettner found this out, "but it is not fundamentally unfair."

The Court provided some legal advice to Buettner, who was acting as his own attorney, about how he could file a new action. But in the present case, it said, "[Buettner] failed to comply with the law. District Court properly dismissed the complaint."

Finstad v. Montana Power Company (1990) — ***tort, covenant, constructive discharge***
241 Mont. 10, 785 P.2d 1372

Ken Finstad worked 22.5 years for Montana Power, the last 15 as field engineer stationed at Cut Bank. His employment ended in June 1982, after discussion of a transfer to Butte. Finstad's managers wanted him to accept the transfer; Finstad did not want to move. Finstad said MPC fired him; MPC said Finstad quit.

Finstad's lawsuit against MPC resulted in a jury verdict in his favor, with an award of $433,500 in damages. MPC asked the District Court for a judgment notwithstanding the verdict and a new trial. The motion was denied, and MPC appealed. The Supreme Court considered two issues: 1) whether sufficient "substantial, credible" evidence existed to support the jury verdict, and 2) whether the implied covenant of good faith and fair dealing should apply to a termination following a refusal to accept a lateral transfer.

In examining the first issue, the Court cited precedent: "In the absence of probative facts to support the jury's verdict, it can be overturned." The Court then undertook an extensive review of testimony and reached "a key factual conclusion: it was Mr. Finstad who made the decision to terminate his employment with MPC. All MPC did was honor his decision." The Court said Finstad's refusal to accept a transfer to Butte, in effect, served notice of his resignation: "... the record does not contain facts establishing an express discharge or actual discharge." In examining whether MPC "rendered the working conditions for Mr. Finstad so oppressive that resignation was his only alternative," the Court concluded that no evidence demonstrated a constructive discharge, either.

Turning to the second issue, the implied covenant of good faith and fair dealing, the Court relied on its recent decision in *Frigon v. Morrison-Maierle* (see page 35). In that case, the Court said the covenant would apply only in situations where an actual or constructive discharge occurred. In Finstad's case, the Court concluded "that a termination following the refusal to accept a lateral transfer does *not* constitute an actual discharge for purposes of invoking the covenant of good faith and fair dealing." The Court overturned the jury verdict and directed entry of judgment for MPC.

Justice Sheehy, with Justice Hunt's concurrence, dissented at length. "Nothing is more clearly established in Montana law," he began, "that when a trial is by jury, all questions of fact are to be decided by the jury." "In reversing this hard-earned verdict," said Sheehy, "no error can be found by the majority" that would justify reversal. "Rather, the majority assume seats in the now vacated jury box and proceed to reverse the earlier jury on the facts."

"Whether Mr. Finstad quit or was terminated was a matter of hot dispute during the trial. The jury chose to believe Mr. Finstad," said Sheehy. He reviewed portions of testimony centering on that dispute. His conclusion was that "the majority apparently contend that the jury had no substantial basis upon which to render its verdict. The record is clear that there was indeed substantial evidence supporting the jury verdict and it should be maintained."

Vuykasin v. D.A. Davidson and Co. and Assend (1990) — ***arbitration*** *241 Mont. 126, 785 P.2d 713*

In this case, the controlling issue was the enforceability of an arbitration clause between employer and employee.

Frances Vuykasin began working for D.A. Davidson in 1979. In 1985, DAD started doing annual performance reviews, and Vuykasin received reviews in 1985, 1986, and 1987. The latter two years, she also receive a bonus the same month as her performance review. It was also those two years that DAD placed an arbitration clause in performance reviews.

The statement was located directly above the line where an employee would sign his or her review. In part, the statement asserted that employment with DAD was at-will. Further, it stated, "I [the employee] also acknowledge and agree that any controversy arising out of my employment or the termination of my employment with the Company for any reason whatsoever shall be determined by arbitration ..."

Well, a controversy arose. In April 1988, Vuykasin accompanied her son, a former DAD employee, to a Saturday meeting with Oswald Aaserud, a current DAD employee. Vuykasin alleged that Aaserud assaulted her, and as a result, she soon quit working for DAD. She filed a lawsuit against DAD and Aaserud, charging assault and battery by Aaserud and negligent hiring of Aaserud by DAD. She sought damages in several areas.

In court, DAD moved to dismiss the suit or, alternately, to have the court compel Vuykasin to submit her complaint to arbitration. The argument boiled down to this: Vuykasin contended she did not knowingly agree to arbitrate and there was no consideration for her agreement. DAD contended the performance reviews constituted a valid agreement, and the bonuses given Vuykasin were in consideration for signing them. (Vuykasin and two other employees stated they were never told the bonuses were given in return for signing.)

The District Court had determined that the arbitration clause was "not part of a document purporting to be an employment contract ..." It said the agreement was invalid in it making because the agreement was not bargained for and Vuykasin did not knowingly enter into it. District Court denied the motion, and DAD appealed.

The Supreme Court reversed. First, it said the arbitration clause was valid: "The performance review spells out a binding performance rating and a recommended salary increase. It contains Ms. Vuykasin's acknowledgement that she has reviewed these items, and her acknowledgement that either she or her employer may terminate employment at any time for whatever reasons. This document is clearly a binding agreement with regard to employment ... The arbitration clause is only a part of the agreement ..."

The Court then turned to the issue of the arbitration clause's enforceability. It may be true, it said, that the overall agreement is invalid, for reasons given by Vuykasin. However, that would be an issue for an arbitrator to decide. Citing its own precedent and that of the U.S. Supreme Court, the Court noted that the questionable validity of a specific arbitration clause could be litigated, but "if the issue is the validity of the entire agreement, this must be submitted to the arbitrators." Here, the arbitration clause is not severable from the entire agreement, so it must be enforced: "Since the District Court has no jurisdiction to determine the validity of the entire agreement, any such issues must be submitted to arbitrators."

Vuykasin argued further that "assault is outside the scope of the arbitration clause," because it is not a normal employment dispute. However, the Court said the clause applied, in its own words, to "any controversy ... arising out of employment." Since the incident here occurred on DAD premises, involved DAD employees, and resulted in Vuykasin's termination, it "is clearly subject to the arbitration agreement." The Supreme Court directed District Court to stay Vuykasin's lawsuit, pending the results of arbitration.

Niles v. Carl Weissman and Sons, Inc. (1990) — ***tort, covenant, res judicata*** *241 Mont. 230, 786 P.2d 662*

In this case, the Supreme Court determined that a final decision from an administrative agency regarding

unemployment benefits is not *res judicata* as to a separate action for wrongful discharge and breach of the implied covenant of good faith and fair dealing. In so ruling, the Court followed *Fetherston v. Asarco (I)* (see page 20) and clarified *Nasi v. Department of Highways* (see page 32).

Frank Niles drove truck for Weissman out of Bozeman. In May 1987, he was supposed to haul a flatbed trailer from Livingston to Bozeman. Niles thought the trailer, loaded with a locomotive motor, was damaged and unsafe. He refused to haul it. Niles contended his supervisor told him to haul it or be fired, a statement the supervisor denied. Niles returned to Bozeman without the trailer, apparently thinking he was out of a job.

Niles filed for unemployment benefits, which were denied on the basis he voluntarily left his job. He appealed the denial, and an appeals referee sustained it. He appealed to the Board of Labor Appeals, which granted the unemployment benefits. Weissman appealed that decision to District Court, which sent it back to the BLA. The BLA reversed, denying the claim. Niles appealed to District Court, but failed to brief his petition. District Court upheld the BLA's decision.

In October 1987, Niles filed a wrongful discharge suit against Weissman. Weissman asked for summary judgment on the basis of the unemployment benefits determination. Weissman contended that the process had determined Niles's voluntary termination, serving as *res judicata* for the tort action. District Court agreed and granted summary judgment. Niles appealed.

The District Court order recognized a Catch 22 in the situation: "If [claimants] fully pursue their administrative remedy for unemployment benefits, they may forgo the remedy in the courts; if they choose to go through the court system, they may be barred by failure to exhaust their administrative remedies." The Supreme Court agreed, "There is indeed a dilemma here ..." and noted an apparent inconsistency between the *Nasi* and *Fetherston* cases.

Res judicata is a legal doctrine of judicial finality, barring relitigation of an issue already decided. The Court outlined the four criteria of *res judicata:* 1) the *parties a* re the same; 2) the *issues* are the same; 3) the *subject matter* is the same, and 4) the *relationship* among the parties, the issues, and the subject matter is the same.

The Court undertook an analysis of the *Nasi* and *Fetherston* cases, and found some crucial differences. "The compelling difference between *Nasi* and *Fetherston* is that in *Nasi,* a specific statute granted the Board of Personnel Appeals jurisdiction to determine Highway Department personnel grievances ... The BPA, by statute, had full jurisdiction to determine all the issues relating to the termination of Nasi." In Niles' case, though, the Department of Labor is limited by statute to determining claims filed for benefits, so "the issue of Weissman's good faith, or possible lack thereof, was not and could not be determined by the Department of Labor ..." "The issues determined before the agency, and to be determined before the District Court are not the same."

Under this analysis, *res judicata* could not apply to Niles's lawsuit. The Supreme Court reversed summary judgment.

Birrer v. Wheatland County School District No. 15 and Keenan (1990) — ***statute, due process***
241 Mont. 262, 786 P.2d 1161

This case involves the termination of a tenured teacher. The termination procedure violated the statute regarding teacher termination, but the Supreme Court let the decision stand, as it "did not offend the purposes of the termination procedure statute (§ 20-4-204, MCA)."

Michael Birrer taught music at Harlowton High School. In March 1987, the superintendent recommended that his and another position be eliminated due to funding shortages. The school board agreed and noti-

fied Birrer of the action. About three weeks later, the board held a hearing for Birrer. He appeared, but offered no evidence contradicting the need for a reduction in force. The board reaffirmed its earlier decision.

Birrer appealed the decision through the County Superintendent of Schools, the State Superintendent of Public Instruction, and District Court. He lost every step of the way. The Supreme Court also upheld his termination, even though the school board's decision "to terminate Birrer ... before notifying the teacher ... and giving [him] a hearing thereon, clearly violated" the law. The statute requires that the school board makes its decision *after* a hearing takes place. Here, the board decided to lay Birrer off *before* the hearing.

Birrer felt he should be reinstated. The school board said mere "technical irregularities" in the termination should not nullify it. The Court did not like the board's argument: "The 'technicality' here goes to the very heart" of the law. "It is obviously public policy ... to protect tenured teachers from unjust terminations ..." Nonetheless, said the Court, "we affirm the termination of Birrer because of the obvious rectitude of the trustees' decision."

The Court reasoned that Birrer "was not accused in any way of incompetence, immorality, unfitness, or violation of ... policy." The reason for his termination was not personal, but "the undeniable and overwhelming state of the school finances" that meant a reduction in force. So, "under the peculiar facts of this case ... the purposes of the procedural statute ... were not contravened here."

Harris v. Cascade County School Districts No. 6 & F and Keenan (1990) — statute, due process 241 Mont. 274, 786 P.2d 1164

This case closely resembles the *Birrer* case. Ray Harris taught physical education at Simms High School. His position was full-time, and he held tenure. The superintendent recommended, and the school board confirmed, these actions: that the full-time PE position be eliminated, that Harris' contract not be renewed, that a half-time PE position be created. The board then notified Harris of his termination. A hearing was held, and the board reaffirmed its decision to terminate Harris.

Harris appealed to the County Superintendent of Schools, who upheld the termination but concluded the board had to offer Harris the new half-time PE position. He appealed to the State Superintendent of Public Instruction, who also upheld the termination and required the district to offer Harris the half-time position. Next stop for Harris was District Court, which affirmed the decision completely, concluding that the "teacher was accorded all of his rights under the statute." Harris appealed to the Supreme Court. The district cross-appealed on the issue of giving Harris the half-time position.

Once again, the Court determined that the school board "violated the statutory procedure for terminating tenured teachers." "Therefore," said the Court, "we must disagree with the District Court's conclusion that the teacher was 'accorded all of this rights under the statute.' The statutory procedure was not followed." The Court rejected the board's semantic arguments and "mere technicality" defense. Nonetheless, said the Court, "we affirm the termination because under these facts the errors committed here did not cause the teacher substantial prejudice." Harris "was not terminated for any personal reason," said the Court, such as incompetence or immorality. "Under the particular facts of this case, no substantial prejudice occurred and the purposes of the procedural statute ... were not contravened."

Turning to the district's cross-appeal, the Court upheld the administrative decisions to require Harris be offered the half-time teaching position. In rejected the board's argument that it had first terminated Harris, thereby removing his tenure, then created the half-time position. The Court called this "a hyptertechnical distinction that could seriously threaten the value of tenure." The Court agreed with the Superintendent of Public Instruction that the board had, in effect, reduced the existing full-time position to a half-time one, and the board had to offer Harris a contract for it.

McCracken and Waggoner v. City of Chinook (1990) — ***tort, covenant, constructive discharge*** *242 Mont. 21, 788 P.2d 892*

John McCracken and James Waggoner worked as police officers in Chinook. Waggoner had started in January 1982; McCracken had started in October 1983. The tenure of both officers was marked by controversy, including allegations of assault, disorderly conduct, and trespass. As a result, their relationship with the City was strained, and the mayor was seeking their resignations.

The officers contended that on July 30, 1984, they were summoned to the mayor's office. McCracken was told he would be laid off due to reorganization; Waggoner submitted a letter of "forced" resignation. Waggoner's letter was never accepted by the City, and McCracken's lay-off was to take effect at a later date.

Shortly after midnight on July 31, 1984, the officers notified the dispatcher that they were "permanently 10-10, 10-42." The first is code for off-shift, the second is code for at home. They never returned to work. The City interpreted this action as a voluntary resignation. However, in February 1986, the two men filed suit against the City, alleging wrongful discharge, constructive discharge, breach of contract, and breach of the covenant of good faith and fair dealing. District Court granted summary judgment to the City and assessed a sanction of $1,200 against the plaintiffs for "lousy pleading." The former policemen appealed.

The Supreme Court agreed with District Court. In order for the men to have a cause of action for wrongful discharge, they would have to show that they had, in fact, been fired. Under Montana law, police officers cannot be fired without a hearing before their police commission. Since this did not take place for McCracken and Waggoner, they could not bring a cause of action for wrongful discharge. Further, said the Court, "Montana has not yet recognized that an action from wrongful discharge can be successfully asserted when an employee voluntarily terminates the employment relationship." [This case arose prior to enactment of the Wrongful Discharge from Employment Act with its definition of "constructive discharge."] "Therefore," said the Court, "because the record indicates that the [officers] voluntarily quit the police force, their cause of action is barred."

The Court also upheld the "lousy pleading" sanction. It noted that the punishment was for "incomprehensible pleadings" and "inept legal work [that] cost the City of Chinook thousands of dollars in unnecessary legal costs."

Smith v. Roosevelt County and Grainger (1990) — ***statute, criminal charges*** *242 Mont. 27, 788 P.2d 895*

Mark Smith worked as deputy sheriff in Roosevelt County from October 1985, until July 1988. He was fired for assaulting a prisoner without provocation. The sheriff cited Smith's actions as a violation of department policies and state law. In addition, he was tried in Federal District Court for mistreatment of a prisoner, since the prisoner in this case was a Native American. The jury, however, acquitted Smith.

Under Montana law regarding sheriff's deputies, Smith had filed a petition for a District Court hearing regarding his termination. After his acquittal, he moved for summary judgment in his favor. District Court denied the hearing and held a jury trial; in March 1989, the jury upheld his termination. Smith appealed.

Smith first contended that summary judgment had been improperly denied. He maintained that the his termination had been grounded on a felony conviction. Once he was acquitted, he argued, the termination grounds were invalid. The Supreme Court pointed out that Smith held "a basic misunderstanding of the termination statute." It was not necessary for a conviction to take place to justify a discharge. Since several questions surrounded the incident that led to his termination, the case properly went to trial.

Smith had moved in trial to withhold from evidence several paragraphs from his termination letter that referred to "other wrongdoings" during his tenure. He contended the information was irrelevant and pre-

judicial. The Court noted "that it was Smith who introduced the letter in its entirety to the jury. ... He cannot now claim that he was denied a fair trial by the admission of evidence that he himself introduced." With regard to witness testimony on the other instances of misconduct, the Court said, "Smith repeatedly solicited testimony from witnesses regarding those issues he now claims to be so prejudicial. We will not be misled by Smith's attempt to characterize his unsuccessful trial tactics as errors of the District Court."

The Court ruled against Smith on five other appeal issues. Among these, it found "that substantial credible evidence supported the jury's finding that Smith was justifiably terminated ..." The other four issues dealt with evidence and jury instructions; the Court affirmed District Court on all issues.

Diemert v. State of Montana, Department of Labor & Industry, and Montana Deaconess Medical Center (1990) — ***tort, procedure*** *242 Mont. 127, 788 P.2d 1355*

Complicated legal process forms the heart of this decision. Josephine Diemert began the process by filing a wrongful discharge suit in October 1985, against Deaconess in Great Falls. Since her application for unemployment benefits had been denied, she also filed against the Department of Labor and Industry (DLI) for judicial review of that decision. DLI moved for dismissal in December 1986, and District Court scheduled a hearing for January 29, 1987. However, DLI withdrew its motion on December 31. Nonetheless, District Court dismissed the case on January 6.

Neither party received notice of the dismissal, and they both proceeded with discovery. On January 13, 1988, District Court held a hearing on a discovery dispute, despite the court's dismissal of the case a year earlier. In May 1989 (15 months later), the DLI attorney found the dismissal notice in the court file. Diemert moved for relief — a "dismissal of the dismissal," so to speak. District Court scheduled a hearing for June 1989 — then July — then September. The hearing never took place, and the case was deemed dismissed under the Rules of Civil Procedure. Diemert appealed to the Supreme Court.

The Court first noted that District Court had "no basis for a discretionary dismissal after the motion to dismiss had been withdrawn." Further, said the Court, "[w]e have reviewed the record and found no other basis for dismissal." Deaconess maintained that Diemert's motion to vacate the dismissal was not timely. The Court noted that the specific rule refers only to "a reasonable time." Since Diemert had never been notified of the dismissal until May 1989, and then made her motion within 30 days of that date, the Court ruled she was entitled to relief. It reversed the dismissal and remanded the case for further proceedings.

Cummings v. Town of Plains, et al. (1990) — ***tort, legislative immunity, § 1983*** *242 Mont. 236, 790 P.2d 486*

Here is another legal puzzle on par with *Diemert* (above). Lon Cummings was a part-time police officer for the Town of Plains. His position was budgeted through June 30, 1986, but the town council eliminated his position in January 1986, citing budgetary considerations. The mayor then rehired Cummings as a relief officer. Cummings filed suit in June 1986 and got involved in an effort to recall four council members. In October 1986, the council informed the mayor via letter that it would not honor Cummings's employment. The mayor immediately terminated him, then reinstated him in November 1986. In January 1987, the council held a closed meeting and then voted to terminate Cummings.

Cummings lawsuit had named the town and the four council members as defendants. All defendants moved for summary judgment, based on legislative immunity (2-9-111, MCA). District Court granted the motion in November 1988. Cummings then moved to amend his original ten-count complaint to four counts: breach of contract, two intentional torts, and a 42 USC § 1983 civil rights claim (1872 Federal Civil Rights Act). District Court denied his motion, holding that immunity applied to the contract and tort claims and that Cummings had no grounds for the § 1983 claim. Cummings appealed.

The Supreme Court ruled only on the § 1983 issue. It held that Cummings had properly pleaded that claim and had raised sufficient issues of material fact to forestall summary judgment. The Court reversed and remanded the case.

Blume v. Metropolitan Life Insurance Company (1990) — ***tort, procedure*** *242 Mont. 465, 791 P.2d 784*

Cylene Blume sued Metropolitan for wrongful discharge. The complaint was served through the office of the State Auditor and Commissioner of Insurance. Metropolitan received and logged the certified mail, but the documents were lost before anyone in authority saw it. Thus, the company never responded. Subsequently, a default judgment of almost $186,000 was entered against Metropolitan. The company immediately moved to vacate the judgment. District Court did not act on the motion within the required time period, and the judgment stood. Metropolitan appealed.

The Supreme Court examined Rules of Civil Procedure, its own precedent, and the facts of the case. It found that "Metropolitan has satisfied all ... requirements for setting aside a default judgment." The company had "proceeded with utmost diligence" once it learned of the default judgment. Its "failure to appear was not due to any inexcusable neglect or disrespect for the court ..." And the Court noted that "[w]hen Metropolitan filed its motion ... it also filed a proposed answer to [the] complaint." The Court held this answer "sufficient to constitute a meritorious defense." Thus, the Court reversed the default judgment.

Birgenheier v. Trustees, Yellowstone County School Distr. #2 and Argenbright (1990) — ***due process, contract, collective bargaining agreement*** *242 Mont. 513, 791 P.2d 1388*

This case prompted the Supreme Court to modify the rule it had stated in the *Bridger* decision (1984, see page 12). Carolyn Birgenheier was a nontenured teacher who, in the fall of 1985, signed an acknowledgement of temporary employment and a one-year contract to be an elementary music teacher in the Billings Public Schools. In April 1986, the school district notified her by letter that her contract would not be renewed. The letter also encouraged her to apply for the position again.

Citing the teachers' union contract, Birgenheier appealed to the school board to state the specific reasons for nonrenewal. The school board gave no further reasons. Birgenheier appealed to the County Superintendent, who held that the school district was bound to provide her with specific reasons for nonrenewal. The County Superintendent concluded that the temporary, one-year contract arrangement was an attempt to evade the *Bridger* rule; he ordered Birgenheier reinstated.

The district appealed to the State Superintendent of Public Instruction, who reversed the decision. He held that the situation was covered, not by *Bridger*, but by terms of Birgenheier's contract. Birgenheier filed for judicial review, and District Court ordered the district to comply with the *Bridger* rule and provide a statement of specific reasons why Birgenheier's contract was not renewed. The school district appealed.

The Supreme Court examined the procedure under statute governing termination of a nontenured teacher (20-4-206, MCA). It first found that the district had satisfied the requirement of the statute to give timely notice. The Court noted that Birgenheier's demand for a further statement of reasons for nonrenewal was grounded in the *Bridger* decision. "It is apparent," said the Court, "that *Bridger* has caused interpretive problems for the parties. In *Bridger*, the key statement was: 'The non-tenured teacher is entitled to a notice which states what undesirable qualities merit a refusal to enter into a further contract.' That statement was not required for the holding in *Bridger*. In addition, it is somewhat inaccurate. It suggest that in the absence of undesirable qualities ..., a nontenure teacher may not be terminated. That is not the requirement of [the statute]."

The Court therefore overruled "the statement in *Bridger* that a nontenure teacher is entitled to notice which states what undesirable qualities merit a refusal to enter into a further contract." The law requires a state-

ment, "but there is no statutory standard that the reasons must be somehow sufficient to merit a refusal ..." The Court's concluded that the district must furnish a statement "in reasonable detail." However, the Court emphasized "that the inadequacy of such a statement will not in any way affect the termination, assuming that timely notice of termination was given."

Heltborg v. Modern Machinery (1990) — ***tort, covenant*** *244 Mont. 24, 795 P.2d 954*

The covenant of good faith and fair dealing is no longer a cause of action in situations covered by the Wrongful Discharge from Employment Act. However, it may still apply to employment relationships exempted by the Act. (The discharge in this case occurred in 1986, so the Act did not apply.) The Supreme Court's narrow four – three decision here could have a profound effect on future cases dealing with the covenant of good faith and fair dealing.

Chris Heltborg worked for Modern Machinery, a heavy equipment dealer in Missoula. Starting as a mechanic, he worked for the company for 22 years, rising to the position of service manager. He suffered from some disabilities, including diabetes and congestive heart failure. In the early 1980s, Modern experienced severe business losses and went through cutbacks. In April 1986, the company terminated Heltborg without prior notice and without severance pay, effective immediately.

Four months later, Heltborg died as a result of asphyxiation at home. His widow brought this suit against Modern, alleging breach of the covenant of good faith and fair dealing, negligence, and wrongful discharge. The last claim was dismissed through partial summary judgment. A jury trial on the remaining two counts resulted in an award of $170,608 to Heltborg's estate. Modern appealed on four issues.

The first issue dealt with expert witness testimony by an employment relations expert, Alan Brown. The Supreme Court noted that admissibility of the testimony came down to "a distinction between testimony on the ultimate factual issue and testimony on the ultimate legal issue." The former is allowable, but not the latter. After examining the trial transcripts, the Court held that "the trial court committed reversible error in allowing Mr. Brown to state legal conclusions on the very issues to be decided by the jury."

The second issue attacked the issue of negligence. Modern contended the trial court had erred in instructing the jury on negligence, and in instructing the jury to consider whether Modern had negligently breached the covenant. The Court analyzed the issue at length, ultimately siding with Modern. In a departure from its point of view in previous "covenant cases," the Court said the disputed instructions "placed the jury in the middle of general management decisions, in effect eviscerating the concept of employer latitude in decision-making." The combination of expert testimony and jury instructions scrutinized Modern's actions "under a broad undefined 'reasonable care' standard. This type of decision cannot properly be scrutinized in hindsight for its legitimacy. Neither should negligence be based on the procedures of other employers."

The Court concluded that "[t]he breach of this duty [of good faith and fair dealing] considers the intentional conduct of any employer. We have not imposed upon the employer a duty to use reasonable care in decision-making, based on a theory of negligence. We conclude that the employer is not under a duty to use reasonable care ... Therefore, ... the management decision to implement a reduction in force for economic reasons is not susceptible to a negligence analysis by a jury."

On the third issue, Modern contested exclusion from evidence of a letter by Heltborg detailing his disabilities. After his termination, Heltborg had applied for Social Security benefits, which were denied. He appealed, and wrote the letter in question. At trial, Mrs. Heltborg succeeded in having the letter excluded. Yet she contended at trial that Heltborg should have remained employed in a lesser position as a mechanic. "The admissions by Mr. Heltborg in his letter," said the Court, "were certainly relevant to rebut this theory." Therefore, it should have been admitted.

The fourth issue on appeal was the trial court's denial of Modern's post-trial motion for a judgment notwithstanding the verdict. Modern contended there was no evidence to support the jury findings. The Court agreed that "negligence does not afford a cause of action," but held "that there existed issues of fact in regard to whether the covenant of good faith and fair dealing was breached ..." Despite its affirmation on this issue, the Court remanded the case for retrial on the other issues.

Justice Sheehy dissented, joined by Justices Hunt and Harrison. "The judicial climate here is not just frosty, it is freezing," wrote Sheehy; "Take this case. Please." His lengthy dissenting analysis castigated the majority on four issues:

> "The majority opinion overall has these principal effects, all deleterious to formerly accepted principles of law:
> (1) Limiting actions for breach of the implied covenant of good faith and fair dealing to intentional breaches, thus eliminating any cause of action for negligent breaches.
> (2) Delimiting the scope of expert testimony.
> (3) Confusing the latitude of employers to make business decisions with concepts relating to the covenant of good faith and fair dealing.
> (4) Preventing punitive damages even for intentional breaches of the covenant."

Koch, Pronovost, & Logan v. Yellowstone County, MetraPark & MetraPark Board (1990) — ***legislative immunity*** *243 Mont. 447, 795 P.2d 454*

This case dealt with the legislative immunity issue previously developed in the *Barnes, Bieber, Peterson,* and *Mitchell* cases (above). Here, the Supreme found that the defendants did not enjoy immunity. *(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

MetraPark, governed by the MetraPark Board, is the county fairgrounds in Billings. In May 1987, the board reorganized the operation, resulting in the termination of the eight employees. Three of them filed suit, which fell to summary judgment on the basis of legislative immunity. Their cases were consolidated on appeal.

The Supreme Court first reaffirmed its stance on legislative immunity against the contention that it should apply only to legislative acts. It then examined the nature of the governmental entities named in the suit. "Yellowstone County is clearly a governmental entity" under the immunity statute (2-9-111, MCA), said the Court. Further, "the County is immune from suit if the MetraPark Board is a legislative body of the County or an agent thereof."

In analyzing the case, the Court examined the statutes that authorize county commissions to create county fair commissions such as the MetraPark Board. It also looked at the statutory powers of the the Board and concluded, "It is evident ... that the statutory powers of the MetraPark Board are limited to the management and operation of the Metra Civic Center and do not include any authority to make, alter, or repeal laws or rules." Lacking any legislative power, the Board would not enjoy immunity, unless it were an agent of the county commission.

On that question, the Court scrutinized the meaning of agency and its application in this case. "Here, there is not specific statutory grant of power to the [county commission] giving it the right to control ... the MetraPark Board relative to the employment function. With respect to the employment of personnel, the MetraPark Board has independently derived statutory powers granted by the legislature and thus is not subject to the control of the [county commission]. Therefore, ... the MetraPark Board is not the agent of the County Commissioners ... Accordingly, the MetraPark Board is not immune from suit ..." However, the Board and its members are officers of the county, and the county is subject to indemnify them for their official actions.

Fellows v. Sears, Roebuck & Co. and Moore (1990) — ***tort, preemption*** *244 Mont. 7, 795 P.2d 484*

This is another case, similar to *Brinkman* (see page 24) and *Smith* (see page 24) in which a union worker's claim in state court was preempted by federal labor law. Helen Fellows began working as a sales clerk for Sears in Butte in 1975. In 1984, she transferred to a service clerk job at the request of management. Both positions were within collective bargaining units, but represented by different unions. At the time of the transfer, the store manager assured her she could transfer back to her old position at any time.

Sears laid Fellows off for a year in the fall of 1987. In the fall of 1988, Sears terminated her employment. She asked to be transferred back to her former position, but the manager denied it. Fellows sued in District Court, alleging wrongful discharge and breach of the covenant of good faith and fair dealing. Sears moved the case to Federal District Court, and Fellows moved it back to state District Court. The state court granted summary judgment to Sears, holding that Fellows's claims were preempted by the Management Labor Relations Act. The court said Fellows had failed to cite a violation of public policy and failed to state a cause of action under the Wrongful Discharge from Employment Act.

On appeal, the Montana Supreme Court affirmed the summary judgment. Fellows argued that the oral promise by the store manager was not grievable under the union contract and could be litigated under state law. The Court cited *Brinkman*, which held "that an aggrieved employee must at least attempt to utilize the grievance process provided for in the collective bargaining agreement." Here, Fellows "made no effort to avail herself of the remedies provided by the collective bargaining agreement."

Furthermore, said the Court, an agreement outside the union contract "is enforceable only so far as consistent" with the contract. The issues in Sears "promise" to Fellows were, in fact, covered by the collective bargaining agreement. Therefore, the summary judgment that federal law preempted Fellows's state claims were correct.

Harrison v. Chance (1990) — ***tort, discrimination*** *244 Mont. 215, 797 P.2d 200*

This decision reversed *Drinkwalter v. Shipton Supply* (see page 25), citing a legislative change that made the Montana Human Rights Act the exclusive remedy for sexual harassment.

Carol Harrison worked as a horse trainer for James Chance from September 1986, to March 1987. Her termination was voluntary, following what she said were constant sexual advances by Chance. She filed suit, claiming wrongful discharge, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, outrage, and tortious battery. District Court granted summary judgment to Chance on the grounds that Harrison was required to press a discrimination complaint before the Human Rights Commission, rather than a tort action in court. Harrison appealed.

Harrison relied on the Supreme Court ruling in *Drinkwalter v. Shipton* that the Human Rights Act was not the only remedy for sexual harassment. In this case, the Court stated, "We do not agree that *Drinkwalter* is controlling; a 1987 amendment to the Human Rights Act [§ 49-2-509(7), MCA] legislatively overruled *Drinkwalter*." The revised statute made the Human Rights Act the exclusive remedy for discrimination cases, and under the Act, all complaints go to the Human Rights Commission.

Harrison argued that the Court in *Drinkwalter* had said that sexual harassment is not necessarily a form of sexual discrimination. The Court called that statement a non-decisive dictum and deferred to "current authority," noting that the Human Rights Commission, all other states, and the federal government consider sexual harassment a form of sexual discrimination. The Court concluded, "We hold that sexual harassment is sexual discrimination under the Human Rights Act."

Harrison contended that Chance's conduct fell under the "bisexual exception" carved out by several federal courts. The exception says that an "equal opportunity lecher" who sexually harasses both males and females is not discriminating on the basis of sex, but may have committed a tort. Harrison alleged that Chance propositioned both her and her son, so she was entitled to press a tort action. The Court dispensed with her argument: "The record indicates that [Harrison] failed to raise the bisexual harassment theory until after the District Court issued its order granting summary judgment."

The Court also disagreed with Harrison's contention that Chance's conduct resulted in several torts: "It may be that the alleged acts provide grounds for ... tort claims. However, the gravamen of [Harrison's] claim is sexual harassment." Because all Harrison's claims revolved around the harassment, her only remedy was under the Human Rights Act.

The Court upheld summary judgment against several other arguments, too. The amended statute was applicable, even though the alleged acts took place before the law was passed; Harrison filed her lawsuit six months after the law took effect. Applying the law did not violate any contract rights, a right to due process, nor equal protection.

In the end, though, the Court did not leave Harrison without remedy. Applying the doctrine of equitable tolling, the Court noted that Harrison might still present her complaint to the Human Rights Commission: "As a case of first impression holding that the legislature overruled *Drinkwalter*, this case should not prevent [Harrison] from having her claims heard by the Human Rights Commission."

Burgess v. Lewis & Clark City-County Board of Health (1990) — ***WDEA, legislative immunity*** *244 Mont. 275, 796 P.2d 1079*

Legislative immunity again came under scrutiny in this case (see *Barnes, Bieber, Peterson, Mitchell,* and *Koch,* above). This case is particularly important, as it questioned whether immunity would apply under the Wrongful Discharge from Employment Act. The Supreme Court held it does. (***NOTE:*** *The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Sidney Burgess worked at a landfill in Lewis and Clark County, beginning in April 1988. In July of the same year, the Board of Health terminated his employment for budgetary reasons but encouraged him to apply for another vacant position at the landfill. He did, but they hired someone else. Burgess brought suit under the Act, alleging the Board's actions violated its written personnel policies. He also requested that District Court enforce an agreement to arbitrate.

District Court dismissed Burgess's suit, holding that legislative immunity under 2-9-111, MCA, barred his claims. Burgess appealed, arguing that the Wrongful Discharge from Employment Act, passed in 1987, limited the immunity statute, passed in 1977.

The Supreme Court first analyzed the immunity status of the Board of Health. Since state law required the County Commissioners to approve all hiring and firing by the Board, the Court held that the Board was an agent of the County Commissioners and thus enjoyed immunity. Turning to Burgess's specific argument, the Court said, "Careful analysis of the Wrongful Discharge from Employment Act proves [his] argument unpersuasive. ... Nothing in the Act suggests a legislative intent to grant recovery where immunity statutes had previously denied recovery. Mr. Burgess has failed to present any logical support for his contention." Thus, held the Court, the immunity applied.

Burgess's appeal also contended he had a right to arbitrate the dispute under the policies of the City-County Health Department. The Court dispensed with his argument: "Mr. Burgess would have a right to arbitration only if he had completed the six-month probationary period. He has not done so and is therefore prohibited from seeking arbitration."

Harris v. Bailey, Livingston School Districts 4 and 1, and Argenbright (1990) — ***tort, statute, due process, legislative immunity*** *244 Mont. 79, 798 P.2d 96*

In this case, William Harris came before the Supreme Court a third time in a string of litigation beginning in 1981. Harris had started working with the Livingston School in 1973. In 1980, his position was amended to school psychologist. In April of 1981, the district terminated his employment.

His administrative appeal eventually wound up with a determination in 1983 by the Supreme Court that he had tenure, and the case was remanded. The County Superintendent of Schools then determined the termination was improper and ordered him reinstated with back pay. That decision was also appealed, eventually to the Supreme Court, which in 1988 upheld the reinstatement but adjusted the back-pay award upward.

During the course of the second appeal, the school district acted in 1985 to terminate Harris's employment for "unfitness and incompetence." The termination was affirmed at the county superintendent, state superintendent, and District Court levels; Harris appealed to the Supreme Court. The Court upheld his termination on all the issues considered in the appeal.

Harris argued that, although his employment as school psychologist was terminated, the district should be required to offer him a teaching position. The Court held that his argument was baseless, in light of both precedent and public policy. Harris also argued that the teacher termination statute (20-4-207, MCA) was incorrectly applied to his employment as a school psychologist, a "specialist." The Court noted that his first appeal resulted in Harris receiving statutory protection as a tenured teacher; "[h]is position at this juncture is totally at odds with this holding and is therefore contrary to both established law and his prior position ... in the earlier appeal."

Harris also sought to invoke the provisions of § 39-2-801, MCA, which requires an employer to provide a written statement of the reasons for termination or be "forbidden from utilizing any reasons for discharge to justify the termination." Harris argued that, back in 1981, the district failed to provide written reasons after his first termination and therefore could not use any such reasons in justifying his 1985 termination. The Court ruled that § 39-2-801 was inapplicable, as Harris's case was governed more specifically by the teacher termination statute, § 20-4-207, MCA.

The Court also held that sufficient evidence existed in the record to support the finding that Harris was incompetent as a school psychologist. Harris did not contest the findings, but argued that he had no formal training as a school psychologist, so it was unfair to hold him to the standards set by the school district. The Court found his argument specious: "Harris was employed as a school psychologist and he accepted the position. He must be judged according to the competencies expected of someone holding such a position." In addition, the Court rejected Harris's arguments that the district had not followed proper procedures to terminate his employment.

Finally, the Court barred Harris from pressing a tort claim of breach of the covenant of good faith and fair dealing against the district. Relying on the legislative immunity statute (§ 2-9-111, MCA) and precedents (see *Barnes, Bieber, Peterson, Mitchell, Koch,* and *Burgess,* above), the Court held the district immune from any liability for bad faith. *(**NOTE:** The 1991 Legislature amended § 2-9-111, MCA, to effectively remove the shield in wrongful discharge situations. A text of the amended law is appended to this summary.)*

Cecil v. Cardinal Drilling Company (1990) — ***WDEA, good cause*** *244 Mont. 405, 797 P.2d 232*

In this case, the Supreme Court began to point out how it would interpret the "burden of proof" under the Wrongful Discharge from Employment Act of 1987. When the defendant employer claimed the termina-

tion was for a "legitimate business reason" (39-2-904(3), MCA), and the plaintiff claimed it was "not for good cause" (§ 39-2-904(2), MCA), the Court sided with the employer.

Donald Cecil began working for Cardinal Drilling in Billings in 1981. When the company president decided to retire in December 1987, an official of the parent company (Ocelot Industries of Canada) told Cecil he was in line to be the next president. Instead, he hired the former president of a competitor, and Cecil was promoted to executive vice president. In April 1988, all Cardinal employees, including Cecil, received raises, and Cecil was promised further raises. In addition, the company increased its budget, anticipating a good year.

In July 1988, Cardinal terminated Cecil's employment, without prior notice and effective immediately. The company offered severance pay on the condition that Cecil sign a release of any claims against Cardinal. Cecil refused and never received any severance pay.

In the eight months following Cecil's termination, Cardinal handed out raises and bonuses to its employees, expanded its drilling operations, and hired a new employee with duties identical to Cecil's. In September 1988, Cecil filed several claims against the company. After the *Meech* decision (see page 46), Cecil amended his suit to a single wrongful discharge claim under the Wrongful Discharge from Employment Act.

The company stated Cecil's termination took place in anticipation of declining oil prices; thus, it defended the decision on the basis of a legitimate business reason — the economic state of the company. Oil prices did, in fact, fall, and in deposition, Cecil admitted the decline was occurring when he was terminated. Citing the agreement of the parties on this fact, District Court granted summary judgment to Cardinal, finding no genuine issue of material fact regarding the reason for the termination. Cecil appealed.

The Supreme Court first looked at the definition of "good cause" in the Wrongful Discharge from Employment Act; the Court also stated, "It is well settled in the case law prior to the Act that economic conditions constitute a 'legitimate business reason.'" The fact was that oil prices were falling, and "once Cardinal made a sufficient showing of no material fact issues, the burden then shifted to Cecil to raise a factual issue sufficient to show that summary judgment was improper." "While Cecil claims to have been wrongfully discharged," the Court said, "he offers no other specific reason for his termination to contradict that he was terminated for economic reasons."

In its holding, the Court laid the burden at Cecil's feet to show that Cardinal treated him wrongly. "... Cecil did not offer any other motive or reason for his termination. He merely denied that the reasons were legitimate business reasons. And while the record might arguably show that it was possible for Cardinal to keep Cecil employed during the decline in oil prices, this Court cannot speculate as to what Cardinal's real reasons may have been, if they were in fact not as claimed."

Majerus v. Skaggs Alpha Beta, Inc., Jacobson, Fuglestad, and Krohmer (1990) — ***tort, covenant, res judicata*** *245 Mont. 58, 794 P.2d 1053*

Doug Majerus worked for Buttrey Food stores for 15 years, rising to manager of a store in Missoula. In June 1986, he took $350 from a till for a gambling trip to Nevada. He repaid the money about 16 days later. In August, the company fired him for taking the money. (Skaggs Alpha Beta was, at the time, the parent company of Buttrey Foods.)

Majerus filed for unemployment benefits, and the administrative case wound its way up to the Board of Labor Appeals. The Board upheld the results of a hearing that had found the termination proper and denied benefits to Majerus. He had the right to appeal that decision to District Court for judicial review. Instead, he filed a tort action against Skaggs and three of its employees, alleging wrongful discharge, breach of the implied covenant of good faith and fair dealing, negligence, and negligent infliction of emotional distress. (His discharge preceded passage of the Wrongful Discharge from Employment Act.)

In August 1989, District Court granted summary judgment to the defendants. It based the decision on three grounds: 1) the doctrine of *res judicata* (see *Niles*, page 56), 2) Majerus's failure to establish a breach of the implied covenant, and 3) the existence of no genuine issue of material fact to be decided at trial. Majerus appealed.

The Supreme Court disagreed with the District Court's interpretation of *res judicata*. The Court noted that the decision rested on *Nasi* (see page 32); however, the Court found the *Niles* case to be controlling and that District Court had erred. "However," said the Court, "this does not necessarily mean that summary judgment was improper ..."

In this case, said the Court, "the defendants did not breach the implied covenant of good faith and fair dealing because they had a fair and honest reason to terminate Majerus — Majerus violated company policy when he admittedly took company funds ..." Although Majerus admitted this was wrong, he argued that termination was too harsh, but the Court found his argument "without merit." The termination was justified, and Majerus had no basis for a claim of breach of the implied covenant. Furthermore, said the Court, "no genuine issue of material fact exists, because the record reflects an admitted and serious breach of store policy arising from the misuse of employer's funds."

*Deeds, et al, v. Decker Coal Company (1990) — **WDEA, exemption** 246 Mont. 220, 805 P.2d 1270*

In this case, the Supreme Court interpreted the "exemption" section (39-2-912, MCA) of the Wrongful Discharge from Employment Act (see appendix). It held that a case is not exempted until another "procedure or remedy" takes effect.

The case arose from a bitter strike at Decker Coal. The collective bargaining agreement expired in October 1987, and about 230 miners went on strike. In June 1988, their union, the United Mine Workers of America, negotiated a back to work agreement while bargaining continued on a new contract. Decker recalled about 80 of the miners, but fired 152 for "serious strike misconduct."

In November 1988, the fired miners filed an unfair labor practice charge with the National Labor Relations Board. In June 1989, they filed a wrongful discharge suit in District Court. District Court granted summary judgment to Decker on the basis that § 39-2-912 exempted the suit. The miners appealed.

The miners argued that subsection (1) of the Act applied only to discrimination cases. The Supreme Court disagreed: "We cannot interpret the statute so narrowly. Clearly, the statute's list is not meant to be all-inclusive, as shown by the term 'and other similar grounds.'" However, the Court found merit in the miners' argument on other grounds. For one thing, the suit was not exempted by the existence of a collective bargaining agreement, since there wasn't one; "[i]t was the expiration of their collective bargaining agreement that set this litigation in motion."

Secondly, said the Court, "no other state or federal statute providing a procedure or remedy for contesting the dispute has yet taken effect, thereby exempting this dispute." The National Labor Relations Board had taken no action on the unfair labor practice charge. "Should the NLRB eventually decide to enter into the dispute by filing a complaint on behalf of the discharged employees," said the Court, "a 'procedure or remedy for contesting the dispute' would be set in motion, and the statutory exemption of § 39-2-912, MCA, would apply. As yet, no such procedure has taken place ... "

The Court wanted to make sure that the dispute could be settled somewhere: "To ensure appellants a forum in which the dispute may be resolved, this cause is ... remanded to the District Court, with the proceedings stayed pending NLRB action."

Barrett v. Asarco Incorporated (1990) "Barrett II" — ***tort, covenant*** *245 Mont.196, 794 P.2d 1078*

This decision resulted from the second appeal in long and complex litigation that began in 1985. A summary of the first appeal appears on page 37. After that appeal, another trial took place, and the jury found for Robert Barrett, awarding $230,000 in compensatory damages. Asarco appealed.

The Court first examined whether "substantial credible evidence" supported the jury's conclusion that Asarco had breached the covenant of good faith and fair dealing. Conceding that the two parties presented "very different versions of the events surrounding Barrett's termination," the Court nonetheless found that Barrett's evidence supporting his case was sufficient. "The jury as fact-finder chose to believe Barrett's version of the conflicting evidence," said the Court. "We will not disturb the jury's determination ... because it is supported by substantial credible evidence."

Asarco also contested admission by transcript of testimony from the first trial into the second. The witness in question was Barrett's brother; he testified at the first trial, but was unavailable to testify at the second trial. Asarco argued that Barrett had made insufficient efforts to get his brother to the second trial. The Court disagreed, finding that Barrett had a reasonable explanation for his brother's absence and that District Court, in its discretion, accepted it. "In short," concluded the Court, " Asarco has failed to meet its burden."

The Court also turned down an argument by Asarco concerning a jury instruction. The District Court had rejected a proposed instruction from Asarco regarding the issue of termination pay. (At the time of Barrett's discharge, his boss had prepared his final paycheck prior to meeting with Barrett. Barrett used this fact as evidence that the boss was out to get him.) The Court found that Asarco's "proposed instruction would have only served to confuse and mislead the jury."

Finally, Asarco contended that Barrett's attorney had engaged in several instances of misconduct during the second trial. The Court, however, could "find no error warranting a new trial. Asarco failed to object to the comments of Barrett's attorney alleged as misconduct ..." The Court concluded this issue on a rule of precedent: "Failure to object to alleged error at trial precludes an appellant from raising that issue on appeal." Thus, the Court unanimously found in Barrett's favor on all issues.

Martin v. Special Resource Management, Inc., Entech, Inc., Montana Power Company (1990) — ***WDEA, tort, preemption*** *246 Mont. 181, 803 P.2d 1086*

This case arose on the "cusp" of the time period when the Wrongful Discharge from Employment Act went into effect. The appeal examined the question of when a cause of action arises — when the employee is notified of her termination, or when it takes effect.

Barbara Martin began working as a clerk-typist for Montana Power (MPC) in 1976. In 1986, she got a job working for Special Resource Management (SRM). SRM is a subsidiary of Entech, which is in turn a subsidiary of MPC. On June 16, 1987, Martin received a letter from SRM's new president, saying her job had been eliminated through a reduction in force. The effective date of her termination was July 17, 1987. (The Wrongful Discharge from Employment Act took effect July 1, 1987.)

Martin, however, learned that her position was not to be eliminated, but to be filled by the president's personal secretary from his previous job at another MPC subsidiary. As a result, Martin filed suit on June 28, 1988, alleging wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence. SRM asked for summary judgment, which District Court granted; the court held that the Wrongful Discharge from Employment Act preempted Martin's tort claims, since her actual termination took place after the Act had taken effect. Martin appealed.

The issue facing the Supreme Court was, at what point did an actionable cause for termination arise — upon notice of the termination or when it took effect? The Court could find no case law in Montana to answer the question. Looking at case law from other jurisdictions, the Court found that "the proper focus, for statute of limitations purposes, was when the act occurred, not when the final consequences came about." Thus, the Court held for Martin "that her cause of action accrued upon notice of her termination." The Court reversed the summary judgment and remanded the case.

Doohan v. Bigfork School District No. 38, Chrysler, and Cochrane (1991) — ***constructive discharge, damages, § 1983*** *247 Mont. 125, 805 P.2d 1354*

This case dealt substantially with the question of constructive discharge and due process. The Supreme Court split four – three on the decision, which reversed a jury verdict for the plaintiff. The Court also refused to yet recognize a claim of intentional infliction of emotional distress in conjunction with a discharge case.

Thomas Doohan worked as Superintendent for the Bigfork School District for two contract terms, from July 1983, to June 1985. He retired on medical disability. He then sued the district and two of the school board members (Chrysler and Cochrane), claiming constructive discharge and intentional infliction of emotional distress. Doohan's claims focused on allegations that the defendants made his working conditions intolerable, resulting in the medical conditions that led to his retirement. A jury trial resulted in awards of $87,500 against the District, $12,500 against Cochrane, and $1 against Chrysler. The defendants appealed.

The Court first looked at Doohan's claim that his rights under 42 USC § 1983 (1872 Civil Rights Act) were violated. At issue was a specific jury instruction dealing with due process. The Court found that "[t]he instruction essentially directed a verdict for Doohan on his § 1983 claim because it incorrectly focused on the idea of constructive discharge 'without a hearing,' and tells the jury that it may find that Doohan was deprived of due process if they find such. However, there was no issue as to giving notice or hearing in this case .... Nor is lack of notice and hearing unusual in a constructive discharge claim. Nevertheless, once the jury found a constructive discharge, they were directed to find a violation of the plaintiff's due process rights."

After looking at several state and federal cases, the Court held that District Court "erred in instructing that it could find a deprivation of due process if it merely found a constructive discharge .... Under the law we adopt here, a § 1983 claim based on harassment at work requires additional proof of the employer's subjective intent to deprive the employee of his due process hearing." In Doohan's case, the school board had asked for his resignation, then withdrew the request to afford time to look into due process requirements. It would be up to the jury, the Court said, to determine if the board was sincere in its concerns; if it were, no deprivation of due process could be found. If the jury found the board's actions were a sham to get rid of Doohan and deprive him of a hearing, Doohan could have a claim under § 1983. However, the District Court had not enabled the jury to consider that question, resulting in reversible error.

Another issue under appeal was whether the school district was immune from damages. The defendants pointed out a U.S. Supreme Court decision that "government officials are immune from civil liability as long as their conduct does not violate clearly established law." However, the Montana Supreme Court pointed out that "§ 20-4-401, MCA, plainly delineates how a school board must terminate a superintendent." If the board constructively discharged Doohan, then it violated the law. The school board also tried to claim immunity under legislative immunity (§ 2-9-111, MCA), but the Court held the immunity was not available for the § 1983 claim, brought under federal law. Therefore, held the Court, the school district was not immune from damages.

A third issue addressed Cochrane's and Chrysler's liability for intentional infliction of emotional distress. The Court recognized it had "not yet dealt with a case which merits recognition of a separate cause of ac-

tion for the intentional infliction of emotional distress." In the Court's opinion, this case fell short as well. After a study of the evidence presented by Doohan, the Court held, "the alleged actions of Chrysler and Cochrane ... fail to approach the threshold of 'outrageousness' necessary to establish a prima facie case of intentional infliction of emotional distress." Thus, the District Court should not have allowed the claim to go before the jury.

The ultimate result of the appeal was a reversal of the jury verdict. The case was remanded for retrial only on Doohan's § 1983 claim under the new standard adopted by the Court.

Justice Weber dissented, with the concurrence of Justices Sheehy and Hunt. Weber argued that majority adopted and retroactively applied a new standard from the federal Fifth Circuit. "That rule," wrote Weber, "is not universally recognized and it was not argued in the parties' briefs. I do not agree that it is a workable rule. I find it inappropriate to retroactively apply such a new standard." Weber further concluded that the record supported Doohan's claim of intentional infliction of emotional distress, "because the evidence of the defendants' acts reached the threshold level of 'outrageousness.'"

Easton v. Cowie, d/b/a/ Cowie Crane Service and *Cowie, d/b/a/ Cowie Crane Service v. Easton (1991)* — ***WDEA, procedure*** *247 Mont. 181, 805 P.2d 573*

This brief decision dealt with the propriety of summary judgment when the plaintiff had failed to respond to requests for discovery within the prescribed time period. The Supreme Court affirmed the summary judgment.

Ernest Easton had filed a wrongful discharge suit against Rex Cowie on August 14, 1989. Cowie countersued for the down payment and value in materials pertaining to a mobile home Easton had bought from Cowie. On July 26, 1990, Cowie served discovery requests on Easton. Under Rules of Civil Procedure, Easton had 30 days to respond, plus mailing time, making the deadline August 28. Easton responded on September 14, but Cowie had already moved for summary judgment the day before.

District Court granted the summary judgment to Cowie, dismissing the wrongful discharge claim. On appeal, the Supreme Court found no abuse of discretion by the District Court. The summary judgment stood.

Buck v. Billings Montana Chevrolet, Inc., Frontier Chevrolet Co., FS Enterprises, Stinson, and Menholt (1991) — ***WDEA, good cause, policy, damages, liability*** *248 Mont. 276, 811 P.2d 537*

In this important five – two decision, the Supreme Court formulated a definition of "legitimate business reason," a phrase in the definition of "good cause" within the Wrongful Discharge from Employment Act. The Court's action expanded the approach it took in *Cecil v. Cardinal Drilling* (see page 65).

James Buck began working for Frontier Chevrolet, his father-in-law's business, in 1973. He rose on his own merit to become general manager, and he was widely recognized in the auto business. Frank Stinson, majority shareholder of FS Enterprises, began negotiations to buy Frontier in 1986. Stinson's established practice was to buy dealerships and install long-term employees as managers.

The final sale agreement between Stinson and Frontier required all officers and directors of Frontier to resign, but not its employees. Buck was not an officer or director. After completion of the sale in August 1987, Stinson named an FS Enterprises employee, Dennis Menholt, as executive manager. Menholt terminated Buck's position as general manager; he later offered Buck the job of Fleet and Lease Manager, which Buck refused.

Buck's lawsuit against the several defendants listed above fell to summary judgment. District Court ruled

that Stinson's practice of placing his own employee in charge of the newly acquired business constituted a legitimate business reason for Buck's discharge. Buck appealed.

The Supreme Court took a long, hard look at the case. First, it determined that "Buck was not a probationary employee. Therefore, in order to establish a claim for wrongful discharge ... he must prove that his termination was not for good cause." This sentence confirms and furthers the direction the direction the Court pointed in *Cecil:* the burden of proof that a discharge was not for good cause will fall on the discharged employee.

In Buck's case, the parties agreed that his performance was satisfactory and he had not disrupted the operations of the business. Instead, the employer said a "legitimate business reason" validated Buck's discharge. In examining this defense, the Court researched the phrase for guidance or precedent on how it should be applied. The Court's efforts were stymied: "This review has been of little assistance. All attempts to more specifically define the term or like terms have resulted in definitions that are as general as the term itself."

The Court thus formulated its own definition of "legitimate business reason":

> A legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of the employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.

In applying this definition to Buck's case, the Court noted Stinson's long-running policy of placing his own employees in charge of newly purchased businesses. Noting that Stinson made a "large investment" in Frontier Chevrolet, the Court recognized that this practice enabled Stinson to "place a long term employee, in whom he held great trust, to manage that investment." In addition, the arrangement was a means for Stinson "to reward long term employees." The Court's conclusion?

> It would be against common sense and rationality for this Court to hold that such reasons or grounds do not constitute a legitimate business reason ... In this case, Buck has not argued these reasons for replacing him were false. Instead, he has steadfastly maintained that these motivations were not justified by the Wrongful Discharge from Employment Act. Because Buck has not come forward with any evidence showing bad faith or falsehood, we hold summary judgment was properly awarded.

The Court stopped short of granting new owners a free hand in cleaning house: "We caution, however, that this holding is confined only to those employees who occupy sensitive managerial or confidential positions. An owner under these circumstances may not hold the right to terminate employees who hold duties which do not require the exercise of broad discretion."

The Court also dealt for the first time with the issue of punitive damages under the Wrongful Discharge from Employment Act (§ 39-2-905(2), MCA). Buck claimed that the manner in which he was discharged constituted "actual fraud," but the Court gave his argument little merit. The "clear language" of the punitive damages section applies only to employees discharged for refusing to violate public policy or for reporting a violation of public policy, said the Court. "There is no evidence Buck reported or refused to violate public policy and he is therefore precluded from obtaining punitive damages under the Act."

Another issue on appeal was whether District Court had properly granted a motion to dismiss Frontier-Montana, FS Enterprises, Frank Stinson, and Dennis Menholt as defendants. The Court analyzed the complex business manipulations that split to original dealership into two corporations: Billings Montana Chevrolet and Frontier-Montana. It concluded that Frontier-Montana was properly dismissed as a defendant.

Buck argued that "it was inconsistent ... to dismiss Stinson and Menholt from the lawsuit and at the same time take their interests into consideration" in saying the discharge was legitimate. The Court disagreed:

> First, a corporation, in and of itself, being an inanimate object, is incapable of formulating its own interests and policies. Rather its interests are formulated by the officers, directors and employees who carry out corporate business. With limited exceptions, these persons are generally immune from lawsuits arising out of corporate affairs.
>
> Second, the Wrongful Discharge from Employment Act provides the exclusive remedy for wrongful termination. All remedies provided by the Act run against the employer. The Act does not envision lawsuits against corporate employees, officers or shareholders. In this case there is no question that Buck's employer was Billings Montana Chevrolet. It was not the employees or shareholders of the Billings Montana Chevrolet. Therefore, as mere shareholders or officers of Billings Montana Chevrolet, Stinson and Menholt were properly dismissed from the lawsuit.

This holding appears to establish an important new direction, disallowing the prosecution of individuals, such as managers or executives, in wrongful discharge lawsuits.

Finally, Buck had agreed in District Court to the dismissal of FS Enterprises as a defendant. The Court went no further than that fact in upholding the dismissal. In addition, the Court required Buck to pay attorney fees and court costs incurred by FS Enterprises from the time of its initial dismissal as a defendant.

Buck's cause was not, however, entirely lost. He cited the company personnel manual "which assured his continued employment if his job performance and economic circumstances remained satisfactory." This gave Buck the footing to maintain his discharge violated the employer's written personnel policy, establishing a claim from wrongful discharge under § 39-2-904(3), MCA. The employer pointed out that it had offered Buck the job of fleet manager. Buck, however, maintained this action was a ploy to avoid a lawsuit and to set him up for later dismissal. The Court held, "If these facts are true, it is possible Buck may have a cause of action ..." The Court reversed summary judgment and remanded the case on these grounds alone.

Justice Trieweiler dissented "from that part of the majority opinion which holds that as a matter of law plaintiff's employer has 'reasonable job related grounds for dismissal based upon ... legitimate business reasons.'" He recalled the reasoning the Court used when it upheld the constitutionality of Wrongful Discharge from Employment Act (see *Meech v. Hillhaven*, page 46): "In balancing the rights of employers and employees to determine where there was rational basis for the Act, this Court concluded that the 'good cause' protection of the Act was a significant factor." Now, said Trieweiler, the Court "begins the erosion of that same 'good cause' requirement which was previously found to be the quid pro quo for rights which have been taken away from employees under the Act."

Trieweiler pointed out that Stinson had decided Menholt would manage the next dealership he purchased "before he ever looked at Frontier Chevrolet, and before he ever met James S. Buck." Since Buck was doing well as manager of the dealership, Stinson's decision affected only his own interests and "had nothing to do with legitimate business reasons of the company which employed [Buck]." "It is logically inconsistent," reasoned Trieweiler, "to dismiss Frank Stinson [as a defendant] ..., but then to consider Frank Stinson's business interests as justification for termination of [Buck]." Trieweiler concluded that Buck "was at least entitled to a jury trial" to determine if his termination was proper. Justice Hunt concurred in the dissent.

Irving v. School District No. 1-1A, Valley County, and Board of Trustees (1991) — **tort,** *§ 1983 248 Mont. 460, 813 P.2d 417*

This teacher-school district dispute is complex and unique: the teacher's complaint extended far beyond judicial review of an administrative decision. After her lawsuit was dismissed entirely by District Court,

the Supreme Court, splitting five – two, remanded the case to be heard on the teacher's complaints of fraud and a violation of 42 USC § 1983 (1872 Federal Civil Rights Act).

Debra Steffani Irving (Steffani) began teaching part-time at Glasgow High School in October 1985. She was employed full-time the following two academic years. Her evaluations rated her teaching ability as above average. The high school principal had recommended against her receiving a contract for the third year, but the school board renewed her contract for that year. She did not receive a fourth contract, did not achieve tenure, and was not rehired in 1988. When Steffani requested the reasons for nonrenewal, the school board wrote her that declining renewal necessitated a reduction in force.

Steffani filed an appeal with the County Superintendent of Schools. She also filed a lawsuit alleging breach of contract, bad faith, fraud, violations of state and federal constitutional provisions, and violation of § 1983. When the County Superintendent and State Superintendent of Public Instruction denied her appeal on lack of jurisdiction, she added a request for judicial review to her lawsuit. District Court dismissed all counts, saying Steffani had failed to state a claim for which relief could be granted. Steffani appealed to the Supreme Court.

1. The Supreme Court upheld the dismissal of Steffani's request for judicial review. As a non-tenure teacher, she was not entitled to a hearing under Montana law. Steffani also complained that the school board violated the Open Meeting Act. The Court noted that the law allows a plaintiff to have a decision, made in an illegally closed meeting, voided. "Steffani has not, however, sought to void the decision of the School Board," said the Court. "Instead, she has sought monetary damages." Such damages would not arise from the act of closing the meeting and would be recoverable under other aspects of her lawsuit, reasoned the Court.

2. Steffani had leveled two allegations of fraud against the school district: one, giving a false reason for her discharge, and two, misleading her into believing she would be interviewed for a part-time teaching position for the 1988-89 school year. The Supreme Court upheld the dismissal of the first allegation. Since Steffani said the principal had told her he would "get her next year" when she received her third contract, she could not logically demonstrate a belief in the reason given by the school board. However, on the second allegation, the Court found that all the elements were present to litigate a claim of fraud.

3. Steffani argued that the school district breached the collective bargaining agreement between the district and the teachers' union. She argued she had more actual seniority than the tenured, part-time teacher who was hired to fill part of her teaching duties. This argument carried no weight with the Court, since the collective bargaining agreement protected seniority only for tenured teachers, and Steffani was non-tenured.

4. Steffani alleged that her discharge violated the Wrongful Discharge from Employment Act. The Court noted the Act specifically exempts "an employee covered by a written collective bargaining agreement," and upheld the dismissal of that count.

5. The Court also upheld the dismissal of Steffani's claim that the school district had breached the implied covenant of good faith and fair dealing. Under the *Brinkman* rule (see page 24), a bad faith claim is barred when the employee is covered by a collective bargaining agreement, as Steffani was.

6. The Court dealt briefly, but significantly, with Steffani's complaint under § 1983. Her count alleged that the defendants, acting under color of state law, had violated her rights to equal protection, free speech, free association, and due process. "On the basis of the District Court's memorandum," said the Supreme Court, "it is impossible to discern the exact reasons for the dismissal of Steffani's § 1983 claims. Her complaint, however, appears to adequately set forth a claim for relief."

The Supreme Court's decision, then, upheld the dismissal of all counts except Steffani's second allegation of fraud and her claim under § 1983. These two counts were remanded to District Court.

Justice Trieweiler, joined by Justice Hunt, dissented. The basis of the dissent was the incomplete record from District Court. Steffani was entitled to an explanation for the dismissal of all counts, but District Court had addressed only two. "It is particularly troubling," wrote Trieweiler, "that on the basis of this inadequate record this Court would enter such an expansive decision ..."

Allmaras v. Yellowstone Basin Properties and Patten Corporation; Rios v. Yellowstone Basin Properties and Patten Corporation (1991) — ***WDEA, tort, preemption*** *248 Mont. 477, 812 P.2d 770*

The separate complaints by Russell Allmaras and Richard Rios against their employer were consolidated in District Court and in the Supreme Court. This brief opinion denied the plaintiffs' constitutional challenges to the Wrongful Discharge from Employment Act.

Allmaras and Rios worked as real estate agents for Yellowstone Basin Properties, a wholly owned subsidiary of the Patten Corporation. Following the termination of their employment with the company, they filed suit. The Supreme Court opinion provides no details regarding their employment or termination; it deals with the following legal issues.

Allmaras and Rios filed three counts in their lawsuit: (1) statutory wrongful discharge, (2) common law discharge, and (3) breach of the implied covenant of good faith and fair dealing. District Court dismissed the latter two counts in summary judgment for Yellowstone. A jury trial on the first count resulted in a verdict in favor of Yellowstone. Allmaras and Rios appealed.

The plaintiffs argued that the Wrongful Discharge from Employment Act violated their constitutional right to a jury trial. Since the Act places a cap on damages for wrongful discharge, they contended, it violates their right to have the jury determine damages. The Court ruled Allmaras and Rios had no standing to raise this issue: "The jury determined that Allmaras and Rios were not wrongfully discharged. Based on this jury verdict, Allmaras and Rios are not entitled to damages ... and therefore cannot claim to be injured by the cap on damages contained in the Act."

Allmaras and Rios also argued that the Act violated the privileges and immunities clause and the equal protection clause of the Montana Constitution. The Act exempts employees covered by a collective bargaining agreement or individual written contract; the plaintiffs said this exemption unfairly prevented them from pursuing their common law actions (Counts 2 and 3), yet exempt employees would be allowed to do so, thus violating equal protection.

The Court disagreed that the Act had unfairly changed the common law: the tort claims Allmaras and Rios wanted to pursue had previously be available only to "at-will" employees; the Act preempted such tort claims with statutory remedies, also available only to at-will employees. Once the Court established this reasoning, it again held that Allmaras and Rios had no standing to challenge the constitutionality of the preemption clause, for they had lost their lawsuit under the Act.

Count 3 had alleged a breach of the implied covenant of good faith and fair dealing. Allmaras and Rios contended it was unconstitutional for the legislature to eliminate this cause of action by passing the Act. The Court relied on the *Meech* decision (see page 46) in reiterating that "no one has a vested interest in any rule of common law." This holding refused the plaintiffs' claim of unconstitutional deprivation.

Allmaras argued that the Wrongful Discharge from Employment Act impaired the obligation of contracts. He claimed he had been hired by Yellowstone on or about July 1, 1987 — the effective date of the Act. Thus, his contract had been established prior to the Act taking effect. Article II, § 31 of the Montana Constitution disallows any law impairing the obligation of contracts already in place. However, said the Court, "Allmaras presented no evidence that the parties entered into an agreement prior to July 1, 1987," so he had no basis for his argument.

Finally, the plaintiffs argued that the Wrongful Discharge from Employment Act violated their constitutional right to due process. However, noted the Court, Allmaras and Rio offered no authority or explanation for their contention, so the Court refused to consider it.

Kittleson v. Archie Cochrane Motors, Inc. (1991) — ***tort, covenant, negligence*** *248 Mont. 512, 813 P.2d 424*

This case stemmed from a discharge, but the lawsuit stemmed from the employer's refusal to grant severance pay. Gary Kittleson worked for Archie Cochrane Motors (ACM) for 17 years, working his way up to General Sales Manager. Over a period of 20 months, according to the owner, Jim McNally, Kittleson's performance went downhill, leading to a demotion to truck manager and, finally, termination of his employment in August 1986.

After his discharge, Kittleson asked McNally about getting severance pay. McNally said he would take Kittleson's reasons for getting severance pay to the firm's board of directors. McNally also allegedly agreed that Kittleson deserved severance pay. The board rejected Kittleson's request. About a year later, McNally wrote a letter of recommendation for Kittleson, backdated to the time of termination. In addition, the firm subsequently provided severance pay to two terminated employees.

Kittleson sued the dealership, alleging negligent discharge, negligent infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, and breach of contract for refusing to grant severance pay. District Court granted summary judgment to ACM, saying no material fact issues were present for litigation. Kittleson appealed.

Kittleson argued that several issues merited litigation: whether he was entitled to severance pay under provisions of the employee handbook, whether his discharge stemmed from an act of improper conduct, whether McNally's statements about Kittleson deserving severance pay imposed an obligation on ACM, and whether McNally actually presented the question of severance pay to the board of directors. The Supreme Court examined Kittleson's legal claims and the facts of the case.

First, the Court dispensed with Kittleson's claim of negligent discharge. Based on its decision in *Heltborg v. Modern Machinery* (see page 61), the Court no longer would recognized a claim of negligence in a discharge case. However, the Court examined more closely whether ACM had breached the covenant of good faith and fair dealing. Kittleson cited ACM's employee handbook, which stated, "If you are separated for cause, whether ... you are given severance pay depends upon the reason you were leaving ..., and each case will be handled individually. Severance pay will not be given, however, for separation because of an act of improper conduct."

Kittleson contended that he had not been fired for an act of improper conduct, so he was entitled to the pay. The Court disagreed: "[W]e need not decide whether Kittleson was discharged for 'an act of improper conduct.' The language of the employee handbook clearly states that 'each case will be handled individually' in deciding whether severance pay is given." Further, said the Court, "[t]he actions of the ACM Board of Directors ... comply with the ACM policy .... McNally's statement that Kittleson had severance pay coming if anyone did is neither a promise to Kittleson that he would receive severance pay nor a representation that the Board decision would be in Kittleson's favor." Therefore, no breach of the covenant of good faith and fair dealing occurred.

Finally, the Court noted that Kittleson's breach of contract claim had no merit, as the employee handbook was not a contract. And, said the Court, the claim of intentional infliction of emotional distress was "without basis."

Mannix v. Butte Water Company and Washington (1991) — ***tort, covenant*** *249 Mont.372, 216 P.2d 441*

This decision by the Montana Supreme Court was narrow in two respects: it focused only on the dismissal of Dennis Washington as a defendant in the case, and it came down with a four – three majority. The decision left Mannix's claims against the Butte Water Company in place and proceeding in District Court.

Gary Mannix started working for the Butte Water Company in 1973, and he presided over it from 1983 to 1985. Throughout his tenure, the company was owned by Atlantic Richfield (ARCO). In December 1985, Dennis Washington purchased the company from ARCO. During the purchase negotiations, Mannix balked at indebting the company with a $2 million loan that Washington would assume when he took ownership. Mannix eventually participated in authorizing a board member to execute the loan.

During the negotiations, Washington had caught wind of Mannix's intransigence. Two days after the sale took effect, a member of the new board of directors, acting under Washington's authority, fired Mannix. Mannix filed suit, claiming wrongful discharge and breach of the covenant of good faith and fair dealing. The original defendants to the suit were ARCO, Anaconda Minerals, Washington Corporations, Dennis Washington, and the Butte Water Company. The first three corporations were dismissed as defendants, and a later summary judgment dismissed all claims but one ("piercing the corporate veil") against Dennis Washington. Mannix appealed Washington's dismissal as a defendant.

Mannix alleged that his discharge was a retaliatory action by Washington, based on Mannix's refusal to indebt the water company prior to its sale. The Supreme Court examined whether "a genuine issue of material fact" existed to overrule summary judgment. In the majority's opinion, there wasn't.

Mannix argued that his discharge ran against the best interests of the water company. The Court noted this might be a legitimate issue, but said, "It is clear that the disagreement about whether it was in the Water Company's best interests to sign the $2 million note was actually between Mannix and ARCO .... Moreover, Mannix has failed to present any facts supporting the argument that signing the note was against the best interests of the company."

After further examining the record of summary judgment, the Court also held that no evidence supported any theory that Washington's action was taken for his own pecuniary benefit. The Court also rejected the possibility that Mannix's discharge was an act of personal retaliation by Washington: "Although he has made an extensive argument, Mannix simply has not brought out any facts to support his position that Washington personally terminated Mannix's employment ... in retaliation for his refusal to sign the $2 million note."

Justice McDonough dissented, joined by Justices Hunt and Treiweiler. McDonough examined the record in light of Washington's possible "intent or motive." "For purposes of summary judgment," wrote McDonough, "the issue for consideration is: whether on these facts, a reasonable inference can be made that Mr. Washington retaliated and intended to punish or harm the plaintiff for his actions in placing an obstacle in the path of the closing of the sale."

Because a determination of motivation would be critical to the ultimate finding of fact, the dissenters considered summary judgment to be inappropriate. McDonough pointed out several precedents that have formed the rule, "If improper motive can reasonably be inferred from the evidence, sworn denial does not entitle a defendant to summary judgment." On this rule, McDonough would submit the uncontested facts to a jury and allow it to determine Washington's intent and motive.

Dagel v. City of Great Falls (1991) "Dagel I" — ***WDEA, exemption, premption, tort, § 1983*** *250 Mont.224, 819 P.2d 186*

In this case, the Supreme Court clarified the exemption in the Wrongful Discharge from Employment Act

for employees under a union contract. The Court also 1) opened the door for tort claims that, at first blush, seem to be preempted by the Act, 2) clarified plaintiffs' eligibility to press a 42 USC § 1983 claim (1872 Federal Civil Rights Act), and 3) reformulated its principle of equitable estoppel.

The case began with Carlene Dagel's resignation from the Public Works Department of the City of Great Falls in November 1987. She had worked there for three years under the supervision of Charlis Manzer. Dagel said that Manzer had continuously harassed her in the job, subjecting her to several disciplinary actions ranging from counseling to suspension. Dagel felt this treatment was the cause of severe emotional problems, so she quit when the suspension was imposed.

Dagel's position was normally covered by a collective bargaining agreement. However, the time of her resignation fell within the "notch" between the expiration of one contract and the execution of a new one. When Dagel and the union tried to file a grievance over the suspension, the city rebuffed them: "[T]here was no contract and no grievance procedure in effect or available ... at the time of the suspension." The City also stated that Dagel voluntarily resigned, thus forfeiting any right to a grievance procedure.

Dagel filed suit against the City, claiming wrongful discharge, violation of her constitutional rights (§ 1983), breach of the covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. She later moved to include Manzer as a defendant in the lawsuit. District Court granted summary judgment to the City, and Dagel appealed.

The Supreme Court first disposed of Dagel's § 1983 claim. The Court noted the distinction between whether the City itself or Manzer, its employee, had deprived Dagel of her rights. Since Dagel specifically cited Manzer as the actor, her allegations essentially were based on the theory of respondeat superior, in which the employer is liable for the actions of it employees. Under a 1978 U.S. Supreme Court ruling, respondeat superior "is not a valid basis for recovery under § 1983." The Montana Supreme Court rejected any arguments that Manzer had "final policymaking authority" and held that Dagel's § 1983 claim was invalid.

In summary judgment, District Court had held that Dagel's claims were barred by legislative immunity under § 2-9-111, MCA (see *Barnes, Bieber, Peterson, Mitchell, Koch, Burgess,* and *Harris,* above). The Supreme Court noted that the 1991 legislature had amended § 2-9-111 (see appendix) to distinguish between administrative and legislative acts. Since Manzer's supervisory actions were "clearly" not legislative acts, the Court held that the City is not immune.

District Court had also held that Dagel was covered by a written collective bargaining agreement at the time of her discharge, so her lawsuit was exempted under the Wrongful Discharge from Employment Act (39-2-912, MCA; see appendix). The Supreme Court noted, "Clearly the City's position that there was no contract and no grievance procedure available to the plaintiff contradicts its later position that there was a collective bargaining agreement which bars her right to sue. Our question," the Court continued, "is whether such contradictory positions are barred under statute or case law."

The Court analyzed at length its prior case law regarding equitable estoppel and a specific statute relating to evidence (§ 26-1-601, MCA). Of importance here is the result: the Court held "that the City may not contend that the plaintiff was covered by a written collective bargaining agreement at the time of her discharge." This ruling allowed Dagel to "proceed with her suit under the Wrongful Discharge from Employment Act."

[Note: A contemporaneous decision from the Ninth Circuit Court of Appeals limited this interpretation. An employee under a collective bargaining agreement may not invoke the Wrongful Discharge from Employment Act to file an action between the time of the contract's expiration and the time when the bargaining parties reach an impasse. "Permitting WDA actions during this period would have the untoward effect of imposing a contract term on the parties and thus altering incentives to negotiate." *Barnes v. Stone Container Corp,* 942 F.2d 689 (9th Cir. 1991)]

Dagel's lawsuit included tort claims regarding breach of the covenant of good faith and fair dealing and infliction of emotional distress, both intentional and negligent. District Court had held these claims preempted by the Wrongful Discharge from Employment Act (§ 39-2-913; see appendix). The Supreme Court noted that Dagel cannot bring tort claims under the Act. "However," said the Court, "plaintiff claims that many of the acts occurred prior to July [1,] 1987, the effective date of the ... Act. It may be that plaintiff will desire to amend her complaint in order to more clearly allege acts which occurred prior to the effective date of the Act, which would allow a pre-Act claim for those damages otherwise excluded by the Act." The Court held that District Court should allow Dagel to amend her complaint.

(It remains unclear what significance this holding may have for employers. In essence, it allows discharged employees to file tort claims for actions that occurred before July 1, 1987, even though their discharge took place after that date. This alone presents a legal twist that neither the legislature nor legal experts had anticipated.)

Finally, the Court addressed the question whether Manzer should be joined as a defendant in Dagel's lawsuit. Dagel had already filed a separate suit against Manzer (see "Dagel II," page 80), and the issues in both suits arose from the same circumstances. Thus, the Court ruled, "In the interest of judicial economy, plaintiff should be allowed to join Ms. Manzer as a party defendant, individually and officially."

Medicine Horse v. Trustees, Big Horn County School District No. 27, and Keenan (1991)
— due process, at-will 251 Mont.65, 823 P.2d 230

This case focused on the plaintiff's "at-will" status. The decision centered not on good cause, though, but on due process. Still, the Supreme Court based its decision on 39-2-503, MCA, the at-will statute. In *Whidden v. Nerison* (see page 143), the Court overruled this case to the extent that it invokes that statute.

Scott Medicine Horse worked as a school custodian, a non-contract employee, beginning in 1984. In August 1988, his supervisor began documenting deficiencies in Medicine Horse's performance and instituted weekly meetings to monitor performance. In November 1988, Medicine Horse received a three-day suspension for misconduct; he did not appeal the disciplinary action.

In December, the district changed work schedules for the Christmas vacation while Medicine Horse was on sick leave. When he returned, he left a note for his supervisor saying he would work his usual shift, not the new one. The supervisor and superintendent considered this action insubordinate, and requested the school board fire Medicine Horse. It did.

The school board granted Medicine Horse a hearing and upheld the termination. Medicine Horse appealed to the County Superintendent, who also upheld the action, saying Medicine Horse was an at-will employee. Medicine Horse then took his case to the State Superintendent, who affirmed the decision. When the issue reached District Court, the same result ensued. Medicine Horse appealed, contending he was denied due process, since he did not receive written notice of the reasons for the termination, written notice of the termination itself, nor a hearing prior to the termination.

The Supreme Court noted "that an 'at will' employee is one whose term of employment has no specific duration. Medicine Horse has provided no evidence that his employment had any specified term." Medicine Horse contended that at-will employment was no longer a "viable" doctrine in Montana law. The Court disagreed, citing *Prout v. Sears* (see page 40) and the Wrongful Discharge from Employment Act: "neither that Act nor any other action by the Montana legislature or this Court has nullified the 'at will' designation or § 39-2-503." Thus, held the Court, Medicine Horse was an at-will employee.

Medicine Horse argued that he still was entitled to written notice. The Court, however, cited past cases to show it "has interpreted the 'at will' statute to mean that notice prior to termination is not required."

Medicine Horse further argued that he had a property interest in his job that entitled him to due process, a pretermination hearing. The Court disagreed: "Medicine Horse's subjective belief that he had a property interest in his job does not create such a property interest."

"A property interest ... must be created by existing rules or regulations, state laws, or understandings," said the Court. Yet, none of these existed that would give Medicine Horse a legitimate claim to a property interest. On balance of these issues, the Court upheld Medicine Horse's termination as an at-will employee who was not entitled to due process prior to termination and held no property interest in the job.

Justice Trieweiler dissented, joined by Justice Hunt. Trieweiler argued that Medicine Horse's at-will status was modified by his "permanent" employment, his reasonable expectation of job security, and by statements made to him by a school board member. These factors would constitute a property interest in the job, entitling Medicine Horse to due process. Further, wrote Trieweiler, due process could be satisfied only through a pretermination hearing, not the post-termination hearing Medicine Horse received.

Kizer v. Semitool, Inc. (1991) — ***tort, procedure*** *251 Mont.199, 824 P.2d 229*

In this four – three decision, the Supreme Court reversed a jury verdict and remanded the case for retrial. At issue was the admission of expert testimony and the manner in which the defense objected to it.

Robert Kizer worked at Semitool for nearly four years, advancing to the position of fabrications manager. By all evidence, his performance was good. He lost his job in a reduction-in-force in February 1987. He filed suit, claiming wrongful discharge, breach of the implied covenant of good faith and fair dealing, and negligence. Kizer prevailed at trial, winning damages of $51,000. Semitool appealed after being denied a motion for a judgment notwithstanding the verdict.

Semitool contended that the testimony of expert witness Alan Brown improperly contained conclusions of law, rather than fact. Citing *Heltborg v. Modern Machinery* (see page 61), the Supreme Court agreed that the testimony was improper. (Brown was the expert witness in *Heltborg*, too.) Kizer countered, saying that Semitool had waived its objection to the testimony in trial and therefore could not raise the issue on appeal. The Court, however, concluded, "Our review of the record indicates that Semitool properly preserved its objection to Brown's testimony for purposes of appeal." On these grounds, the Court reversed the verdict.

The Court addressed two other issues for "guidance on retrial." Semitool had argued that instructing the jury on negligence ran counter to the conclusions in *Heltborg;* in that case, the Court ruled that a management decision to reduce its workforce could not be subject to a claim of negligence. In this case, though, the Court said, "[W]e did not hold in *Heltborg* that there can never be a claim for negligence in the termination ...." Under the circumstances here, said the Court, the jury could examine whether Semitool was negligent in terminating Kizer.

The other issue raised by Semitool followed from the Court's decision in *Cecil v. Cardinal Drilling* (see page 65). In that case, the Court had held that the employee had not presented any evidence to rebut the employer's statement that the discharge was for "good cause, " i.e., economic necessity. The Court noted that *Cecil* was decided under the Wrongful Discharge from Employment Act; Kizer's termination took place prior to the effective date of the Act. Further, said the Court, "[i]n contrast to *Cecil*, the evidence presented at trial in this case was sufficient to raise a reasonable jury issue as to whether Semitool acted with other than purely economic motives when it terminated Kizer's employment."

Justices Hunt and McDonough joined in the dissent penned by Justice Trieweiler. They concurred with the majority on the last two issues, but dissented from the conclusion that Semitool had properly objected to the expert testimony during the trial. Trieweiler argued that the objections raised by Semitool were not specific enough to exclude the testimony. "It is simply not fair," he wrote, "to reverse a verdict for either party based upon error which was not brought to the attention of the district judge and the other party."

Scott v. Eagle Watch Investments and Bouma (1991) — ***tort, covenant, at-will***
251 Mont.191, 828 P.2d 1346

This case spanned over nine years. The factors leading to litigation were set in motion in 1980 when Peter Bouma became interested in reopening an athletic club in Missoula. As he looked into the possibility, he came to know Bruce Scott, who had previously managed a tennis club. Together, the two men set about putting a plan into action. Bouma invested over three quarters of million dollars; Scott contributed his "expertise." As the project materialized, the men agreed that Scott would be general manager of the club and that they would share profits from the venture. Although they drafted an employment agreement, it was never signed.

Club membership was full even before the club opened in January 1982. Bouma and Scott agreed to retain an accounting firm to help track finances. Within a short period of time, though, Bouma became dissatisfied with Scott's performance as manager, particularly in the financial area. In June 1982, Scott assured Bouma that all bills were paid and the club's checking account was flush. The next day, Bouma learned from the accounting firm that the checking account was overdrawn, several bills were unpaid, and Scott had withdrawn about $13,000 in two installments. Bouma fired Scott.

Scott filed suit on several grounds, primarily seeking $720,000 in shared profits he lost due to termination. District Court found that (1) Scott was an at-will employee, (2) Scott had breached his oral agreement with Bouma, (3) Bouma was justified in terminating Scott, and (4) Scott owed Bouma principal and interest on the improper withdrawals. Scott appealed.

The Supreme Court considered two issues. The first was whether Scott was an at-will employee. Yes, said the Court, "neither party signed the [draft] agreement committing them to a specified employment term." Thus, under the law, Scott's employment was at-will.

The second issue was whether Bouma breached the implied covenant of good faith and fair dealing. The Court noted that "Bouma chose to terminate [Scott's] employment due to various deficiencies in Scott's performance." Reviewing the record of those deficiencies, the Court concluded, "Overall, Scott did not fulfill the basic functions of a general manager and Bouma honestly believed his interests were being mishandled. Bouma took steps to correct the problem and was justified in terminating Scott." The Court affirmed the District Court judgment in all regards.

Dagel v. Manzer (1991) "Dagel II" — ***res judicata, § 1983*** *251 Mont.176, 823 P.2d 874*

This is the second appeal by Carlene Dagel. (See *Dagel v. City of Great Falls*, page 76.) Dagel had filed this suit directly against her former supervisor, Charlis Manzer. The grounds were wrongful discharge, violation of constitutional rights, and negligent infliction of emotional distress. District Court granted summary judgment to Manzer on three bases: 1) the Wrongful Discharge from Employment Act barred the wrongful discharge claim, as it was filed nearly three years after Dagel's discharge. Under the Act, the statute of limitations is one year. 2) The Act precludes any damages for emotional distress. 3) The doctrine of *res judicata* barred Dagel's claim that Manzer violated her civil rights under 42 USC § 1983 (1872 Federal Civil Rights Act).

The Supreme Court did not decide on the merits of the first two issues. Since Dagel had conceded the issues in District Court, "these issues were not properly preserved for appeal." Summary judgment stood.

On the third issue, the Court reversed. Given the Supreme Court ruling in *Dagel I*, District Court had barred Dagel's § 1983 claim against Manzer individually. However, its decision was in response to a motion to dismiss for failure to state a valid claim, rather than a motion for summary judgment. The Supreme Court found that "as a result, neither [Dagel] nor Ms. Manzer was able to present all the facts and theories

regarding the claim. We conclude that ... [Dagel] has sufficiently alleged a § 1983 claim against Ms. Manzer. We further conclude that it is not appropriate to apply the holding from *Dagel I* as res judicata in this case." In effect, the ruling allowed the previous ruling from *Dagel I* to stand — Dagel could join Manzer as a defendant in that suit.

Colstrip Faculty Association, MEA/NEA v. Trustees, Rosebud County Elementary School District No. 19 and High School District No. 19 (1992) — ***due process, arbitration***
251 Mont.309, 824 P.2d 1008

This case concerns the avenues of appeal subsequent to a teacher's termination. The Supreme Court ruled that the school district had to submit to arbitration as well as an administrative appeal. This "double appeal" came about as a result of the district's own actions.

When Elmer Baldridge was terminated from employment as a tenured teacher, he pursued an appeal through the County Superintendent of Schools and State Superintendent of Public Instruction. Concurrently, the teachers' union filed a grievance against the district on Baldridge's behalf. After the internal grievance steps were exhausted, the union requested arbitration. The district refused to submit to arbitration.

When pressed by the union, the district petitioned District Court for an injunction to compel the union and Baldridge to choose one avenue of appeal — either the administrative route or arbitration. Baldridge replied by asserting that the two avenues represented separate and distinct causes of action. The union pointed out that the district could have bargained for an "election of remedies" provision in the collective bargaining agreement, but did not.

District Court denied the school district's petition. The district did not appeal the decision, yet it still refused to submit to arbitration. The union then filed a complaint asking the court to compel the district to submit to arbitration. District Court granted summary judgment to the union, and the school district appealed.

The Supreme Court ruled that since the school district failed to appeal the District Court's denial of an injunction, it was bound by that decision and "must participate in arbitration." "Accordingly," the Court continued, "the school district is collaterally estopped from raising the issue of whether Baldridge and the union should be allowed to pursue their separate claims in separate forums."

Justice Weber filed a special concurring opinion. He agreed with the result of the decision, but disagreed that collateral estoppel applied. The District Court had held only a hearing on a petition for injunctive relief. It had not entered a final decision on the merits of the case; thus, a major element giving rise to collateral estoppel was absent. Weber said the summary judgment could have been upheld "on other grounds," without specifying them.

In the Matter of the Termination of William Wong, Wong v. City of Billings and Billings Police Commission (1992) — ***due process*** *252 Mont.111, 827 P.2d 90*

Must an administrative agency always reschedule a hearing to allow the employee to retain effective counsel? In this case, the answer was a limited "no," due to the neglect of the employee himself.

The sequence of events began in 1987, when William Wong, an 18-year police officer in Billings, got divorced. For the next two years, Wong carried out a campaign of harassing and threatening his ex-wife, Pamela. Most of his actions took place while he was on duty and in uniform. Pamela got a restraining order; Wong ignored it. Pamela complained to the police chief, who ordered Wong to cease his harassing activities while on duty; Wong violated the order. Finally, Pamela filed a citizen's complaint with the police department, prompting an internal investigation.

As a result of the investigation, Wong was told that a police commission hearing would take place. Wong contacted counsel for his union; the attorney said he would represent Wong if scheduling permitted. A formal complaint alleging 39 charges was served on Wong, with a hearing date set 22 days later. Wong contacted the attorney immediately, but delayed sending a copy of the complaint for a week. When the attorney requested a postponement of the hearing, the Police Commission denied it, eight days before the hearing date. The attorney then referred Wong to private counsel, who offered to take the case on retainer. Wong declined to pay the retainer. However, he went back to the private attorney two days before the hearing; at that time, the attorney declined to take the case, citing lack of time to prepare.

Wong ended up representing himself in the hearing, with assistance from the Commission on how to proceed. As a result of the hearing, the Commission permanently discharged Wong from the police force. Wong appealed to District Court. The court found that the city had good cause to discharge Wong. But it held that the Commission's refusal to postpone the hearing was arbitrary and capricious, denying due process to Wong. The court reversed Wong's discharge and sent the case back to the Commission for a new hearing. The city appealed.

The Supreme Court reversed. It found, in a six – one decision, that Wong had had plenty of time to obtain counsel and prepare for the hearing; it was his own delay that landed him in the hearing without counsel. "In making its decision ...," said the Court, "a court or agency must assess whether the party petitioning for a continuance has acted diligently in seeking counsel. If the party has not acted diligently ..., a tribunal does not abuse its discretion in denying the continuance."

Here, the Court concluded "that Wong's own actions, or lack thereof, prevented him from obtaining counsel. Therefore, the Commission did not act arbitrarily or capriciously in denying the request for a continuance." As a result, Wong received adequate due process. The Court ordered reinstatement of the original decision of the Commission discharging Wong.

Justice Weber dissented. He argued that the Commission had, in fact, acted arbitrarily in denying the request for a continuance.

Weber v. State of Montana (1992) — WDEA, damages 253 Mont.148, 831 P.2d 1359

This appeal was brought by both parties after a jury verdict in favor of the plaintiff. In addition to ruling on two issues about evidence in the case, the Supreme Court interpreted how damages may be awarded under § 39-2-905(1), MCA — the Wrongful Discharge from Employment Act's section on remedies. The Court held, five – two, that juries have the discretion under the law to determine the amount of damages, up to the cap set by the Act.

Steve Weber worked for the State for 16 years before resigning in September 1988; at the time of his departure, he was an attorney with the Tort Claims Division in the Department of Administration. About a year later, he brought suit, claiming he had been constructively discharged — harassed, treated unfairly, and demoted for his actions involving an insurance claim submitted to his division by the Publications and Graphics Division of the same department.

Weber resisted approving the claim of $111,000; he thought it was at least $105,000 too high. Weber said his bosses then ordered him to pay the claim. He did so, but he also brought the issue to the attention of the legislative auditor. The auditor found that Publications and Graphics used the insurance money improperly, purchasing office furniture rather than replacing or repairing the damaged equipment. However, the auditor did not investigate whether the claim had been inflated.

Following the controversy, said Weber, his bosses mistreated him, falsely accusing him of work errors and not talking to him. When they informed him that his position was being reclassified — in effect demoting

him — he resigned. Weber brought suit, claiming the agency had forced him to quit — in effect, constructively discharging him. A jury found in Weber's favor, awarding him $33,230. Weber appealed on the issue of damages and attorney fees. The State cross-appealed on the issue of substantial evidence to support the verdict.

The Supreme Court first considered whether certain evidence should have been admitted at trial. Weber disputed the admission of his performance appraisal and testimony regarding his performance. However, said the Court, Weber introduced evidence of his "diligent work habits," so the State was permitted to rebut that testimony. Weber raised other, more technical arguments against the admission of evidence, but the Court did not accept them.

On the other hand, the State contended that the evidence at trial failed to support the jury's verdict at all. The Court reasserted its "very limited role in reviewing jury verdicts"; viewing the evidence in favor of Weber, who prevailed, the Court concluded the evidence supported the verdict.

On the issue of damages, Weber relied on § 39-2-905(1) of the Wrongful Discharge from Employment Act, which says, in part, "... the employee may be awarded lost wages and fringe benefits for a period not to exceed four years from the date of discharge ..." Weber contended this clause mandates the full award of four years' wages and benefits. The Supreme Court emphasized the word "may" and held the statute "places the discretion in the trier of fact to determined the amount of lost wages and benefits ..." Weber also argued that the jury's award ran contrary to the evidence in his favor. The Court refused to reweigh the evidence, concluding there was "substantial evidence to support the verdict."

Weber's appeal also sought to recover attorney fees and court costs from the State. Under one theory of "private attorney general," Weber argued, he should recover the costs because he pressed the issue of a fraudulent claim by Publications and Graphics when his employing agency would not. The Court found his argument misdirected: "the present action was brought to recover losses for ... wrongful termination, not as a vehicle to reimburse the State for fraudulent claims."

From another angle, Weber claimed he was entitled to recovery under a statute that grants attorney fees and court costs if the defense of the State "was frivolous or pursued in bad faith." Weber contended that the State's defense of the "inflated" insurance claim showed bad faith. The Court said Weber again missed the mark: the State wasn't defending the claim, it was defending its discharge of Weber. The Court also pointed out that Weber initially sought $500,000 in his suit, later offered to settle for $170,000, and eventually received $33,320; "these figures demonstrate that the State's defense was not frivolous." The Court upheld denial of costs and attorney fees.

Justice Hunt dissented, joined by Justice Trieweiler. The dissent focused on the issues of damages and attorney fees. In Justice Hunt's opinion, the jury instruction concerning damages was incorrect. The jury had discretion to determine whether a wrongful discharge, in fact, occurred. Once it had made that determination, however, it should have been directed to award the maximum amount. Hunt would leave with the jury to determine how much to deduct from the award based on what the employee "could have earned."

Justice Hunt disagreed with the majority's rejection of the private attorney general theory. Weber claimed he had been discharged for trying to expose fraud and waste; the jury found that a wrongful discharge had taken place. Therefore, Weber should have fallen under the private attorney general doctrine, which arises when a private citizen sues to enforce significant public interests when the State has failed to enforce those interests.

Miller v. Citizens State Bank (1992) — ***WDEA, good cause, policy*** *252 Mont. 472, 830 P.2d 550*

This case went to the heart of the Wrongful Discharge from Employment Act — § 39-2-904(2) (good cause) and § 39-2-904(3) (personnel policy).

Yvonne Miller worked for Citizens State Bank for 33 years. For 10 of those years, she was operations officer, until she was fired in 1989. Managers who oversaw her work through 1987 testified that she was a good employee. A new bank president who took over in 1987, though, and Miller had a hard time working with him. The new president implemented changes in the bank; Miller resisted. Her boss was demanding; Miller bucked the system. After a poor performance evaluation and three warnings, Miller still delayed work and resisted changes, so she was fired.

Miller brought a wrongful discharge suit against the bank. After a bench trial, District Court decided in favor of the bank. Miller appealed. The Supreme Court first looked at good cause. Miller wanted the Court "to adopt a new standard of 'good cause' based on whether the employee satisfied the general obligations of an employee ..., whether the employer followed industry standards of progressive discipline, and whether the defendant [employer] exercised bad faith."

The Court disposed of her proposal: "In light of the statutory definition adopted by the legislature, we conclude that it is inappropriate to apply the standard advanced by Ms. Miller." The statutory definition reads, in part, "reasonable, job-related grounds based on a failure to satisfactorily perform job duties ..." District Court had found — and Miller was unable to refute — that she failed to perform her job duties satisfactorily. Thus, the Supreme Court held that "the Bank terminated Ms. Miller for good cause ..."

Miller also contended the bank had violated its own personnel policy by not providing her with a formal warning of discharge. However, the record showed the bank president had warned Miller that continued substandard performance would result in dismissal. The Supreme Court did not find any violation of the bank's personnel policy. The Court affirmed District Court's judgment in full.

Foster v. Albertsons, Inc., Engle, and Blackburn (1992) — ***tort, discrimination, damages*** *254 Mont. 117, 835 P.2d 72*

This labor relations case is significant: it opened the door for tort actions in discharge situations where the employee worked under a collective bargaining agreement. As a result, the Court overruled *Brinkman v. State of Montana* (see page 24) to some extent.

Barbara Foster started working as a grocery clerk for Albertsons' store in Helena from January 1984. Her position was covered by a collective bargaining agreement. Foster claimed that during her employment, the store manager (Engle) sexually harassed her repeatedly. She claimed to have consistently resisted his advances. Engle denied harassing Foster in any way.

In March 1987, Engle and the store's loss prevention manager (Blackburn) used "test shoppers" to determine if Foster was mishandling money. (Test shoppers act as impatient customers who leave exact change for a purchase while a clerk is handling another sale. Managers then check the clerk's till to see if the test purchases were properly rung up.) Engle and Blackburn called Foster into the office; what happened there was disputed. Foster claimed she was detained for two hours and repeatedly pushed back into a chair whenever she sought to leave. The managers denied this. Foster did write and sign a statement admitting to dishonesty. She was fired. Foster never filed a grievance under the collective bargaining agreement.

Foster filed a sex discrimination complaint with the Human Rights Commission. In March 1988, the HRC issued her a "right to sue" letter. She brought suit in District Court, claiming (1) breach of the covenant of good faith and fair dealing, (2) false imprisonment, (3) wrongful damage to marriage, (4) assault and battery, (5) negligent and intentional infliction of emotional distress, (6) defamation, and (7) wrongful discharge.

The case went to trial before a jury. The District Court directed a verdict in favor of Albertsons on the claims of defamation, breach of the implied covenant, wrongful discharge, and intentional infliction of emotional distress. The jury deliberated on the claims of false imprisonment, assault and battery, and sex discrimination. It found for Foster on the first two claims and cleared Albertsons of the sex discrimination claim. The jury awarded Foster $5,000 general damages and $5,000 punitive damages. Foster moved to increase the punitive damages; District Court denied her motion. Foster appealed.

The Supreme Court first addressed the issues of breach of the covenant of good faith and fair dealing and wrongful discharge. Following *Brinkman* (see page 24), *Smith* (see page 24), and *Fellows* (see page 63), the District Court had ruled that federal labor law preempted these claims. On appeal, Foster pointed out that *Brinkman* should be reviewed in light of a later U.S. Supreme Court decision (*Lingle v. Norge* (1988) 486 US 399, 108 S.Ct. 1877, 100 L.Ed.2d 410). That decision held that federal labor law preempts a state-law claim, such as Foster's, only if resolving the claim requires reference to the collective bargaining agreement.

Under this holding, the Montana Supreme Court recognized that *Brinkman* was overruled to this extent: although a lawsuit in state court could look at the same set of facts as a grievance under a labor contract to determine just cause, the lawsuit was not preempted as long as it did not require any analysis of the labor contract itself. How did this affect Foster's claims?

The Court noted that "[a]ny implied covenant of good faith and fair dealing in the employment context arises from the underlying contract of employment which, here, is the collective bargaining agreement." Litigation on the implied covenant would "necessarily require placing the terms of the collective bargaining agreement in issue." So federal labor law preempted Foster's claim.

Foster's wrongful discharge claim arose from her boss's alleged sexual harassment and sex discrimination. The Court has "recognized a cause of action for discharge from employment that violates public policy. Sexual harassment is against public policy." (See *Drinkwalter v. Shipton*, page 25, but see also *Harrison v. Chance*, page 63.) A trial on the questions of fact surrounding sexual harassment and discharge would not depend on the meaning of any part of the collective bargaining agreement. So, Foster's wrongful discharge tort claim could proceed without preemption. (Foster, as a union employee, was exempt from bringing a statutory claim under the Wrongful Discharge from Employment Act.)

Finally, the Court addressed Foster's claim of intentional infliction of emotional distress. District Court had held that emotional distress could be a basis for determining damages, but could not be an independent tort action. The Supreme Court cited *Doohan* (see page 69): "We have not rejected the validity of the tort of intentional infliction of emotional distress as a separate cause of action. Rather we simply have not addressed a factual situation that would give rise to liability for the tort ..." The Court held that Foster should be allowed to present evidence of her employer's "extreme and outrageous conduct" to determine if she has a prima facie case for intentional infliction of emotional distress.

The Court remanded the case for further proceedings on the tort claims of wrongful discharge and — potentially — intentional infliction of emotional distress.

Kenyon v. Stillwater County and Laws (1992) — ***tort, covenant, discrimination***
254 Mont.142, 835 P.2d 742

The circumstances of Roberta Kenyon's employment with Stillwater County were complicated. She began working in 1969 for a law firm. One of its partners was part-time County Attorney, so Kenyon ended up doing some work for — and being paid by — the county. By 1977, the county workload had grown to the point where Kenyon was working full-time for the county. In the interim, the other partner in the law firm, Ed Laws, had assumed the part-time duties of County Attorney.

In 1988, Laws became full-time County Attorney. He dissolved the law firm and replaced Kenyon as secretary in the county office, relegating her back to the private sector working for the former partner. That job petered out, though, as the former partner's health quickly failed.

In the fall of 1988, Kenyon brought suit against the county and Laws, alleging age discrimination, wrongful discharge, and breach of the covenant of good faith and fair dealing. District Court granted summary judgment to the defendants, finding that (1) Laws was not individually liable, (2) Kenyon did not establish a case of age discrimination, and (3) her termination was for good cause. Kenyon appealed.

The Supreme Court agreed that Laws was not individually liable, although for reasons different than the District Court's. Under state law (2-9-305, MCA), a county employee is immune if the county acknowledges that his conduct arose out of the course of his official duties. "As an elected official," said the Court, "it is clear that Laws is an employee of the County for liability purposes ... Furthermore, both Laws and the county commissioners agree that Laws was acting within the scope of his official duties ... when he discharged Kenyon."

Kenyon inferred age discrimination from the fact that Laws replaced her with a younger woman. The county rebutted the allegation with evidence of Kenyon's poor performance, frequent absences, and time spent on nonprofessional duties. Under the standard used for discrimination cases, it then fell to Kenyon to produce evidence showing the county's rebuttal was a pretext. She failed to do so, so the Supreme Court upheld summary judgment on the discrimination claim.

Using the evidence introduced to rebut the discrimination claim, District Court had found that Kenyon's discharge was for good cause. The Supreme Court reversed on this issue, since the "good cause issue as it related to the wrongful discharge claim was not raised or argued by either party." The county had premised its defense to the wrongful discharge claim on legislative immunity (2-9-111, MCA). "By granting summary judgment on the basis of an issue not before it," held the Supreme Court, "the court effectively denied Kenyon notice and an opportunity to be heard on the issue." The Court further reversed summary judgment on the wrongful discharge claim, holding that disputed factual issues remained as to whether the county had followed its personnel policies.

The county's defense of legislative immunity evaporated in the Supreme Court decision. District Court had determined that immunity did not apply, but the county did not cross-appeal that holding to the Supreme Court, so the Court refused to address it. The Court remanded the case for further proceedings on Kenyon's wrongful discharge claim.

Farris v. Hutchinson and Board of Regents (1992) — ***WDEA, contract, exemption, tort, covenant*** *254 Mont.334, 838 P.2d 374*

In this case, the Supreme Court essentially said a contract's a contract, and we need not look any further. The four – two decision also looked at the exemption for contract employees under the Wrongful Discharge from Employment Act.

Carol Farris worked for the Montana University System as gender equity coordinator from 1989 to 1991. During that time, she signed three "professional employment contracts," each with a term of one year. Each contract provided for nonrenewal with adequate notice. On February 5, 1991, the Commissioner of Higher Education, John Hutchinson, notified Farris that the contract expiring June 30, 1991, would not be renewed. He provided no reason for the nonrenewal.

Farris filed suit against the Commissioner and the Board of Regents. The Supreme Court opinion does not detail specific counts; it appears Farris claimed breach of the covenant of good faith and fair dealing, a tort of wrongful discharge, and wrongful discharge under the Wrongful Discharge from Employment Act. District Court dismissed the suit, and Farris appealed.

District Court had found that Hutchinson had not breached Farris's contract, so could not have breached the implied covenant of good faith and fair dealing. The Supreme Court disagreed: "a breach of the underlying contract is not a prerequisite to a breach of the implied covenant ..." Farris argued that objective manifestations of job security existing beside the contract could support her claim that the implied covenant was breached.

Farris cited certain oral representations as evidence of objective manifestations. Prior to her hire, she said, the Commissioner told her he viewed the job as a "permanent position." She believed that the yearly contracts were "merely a formality." In addition, she had quit her previous job, sold her house in Great Falls, and moved to Helena to take the job with the University System.

The Supreme Court was sympathetic, but said Farris's arguments "cannot overcome the Parol Evidence Rule." That rule, found at 28-2-904, MCA, states, in part, "The execution of a contract in writing ... supersedes all the oral negotiations or stipulations concerning its matter ..." and preceding its execution. So, any representations by Hutchinson, made before Harris hired on, were barred from consideration by the rule. In addition, any representations made after the contracts were signed could not be considered; 28-2-1602, MCA, states that contracts can be altered only in writing or by executed oral agreement.

As a result, said the Court, "the alleged implied covenant cannot be in direct contradiction of the written term contract." Further, "[n]o obligation can be implied which would result in the obliteration of a right expressly given under a written contract." Here, the University System had the right, under contract, not to renew the contract.

On her wrongful discharge claims, Farris argued that the Wrongful Discharge from Employment Act "imposed a just cause requirement on all employment relationships in place of common law remedies." And when the Commissioner adopted policies allowing him to terminate employment without cause through nonrenewal of a contract, he violated the public policy expressed in the Act. So even if Farris's situation was not covered by the Act (and it wasn't), she argued that the Commissioner committed the tort of wrongful discharge by terminating her employment in violation of public policy.

The Court disagreed. First, it found Farris's employment expressly exempted from the Act; 39-2-912 specifically states the Act does not apply to an employee covered by a written contract for a specific term. Second, said the Court, "[n]othing in our law forbids the parties here from entering into such a contract where the contract is exempted from the Act. We have previously upheld the discretionary rights of employers to non-renew specific term contracts without a showing of good cause. In addition no other violations of public policy have been asserted which would give rise to a wrongful discharge claim." In sum, the Court affirmed dismissal of Farris's suit.

Justice Hunt dissented, joined by Justice Trieweiler. Hunt called the decision "a devastating blow to Montana workers" that "encourages employers to deal dishonestly with employees ..." In using the parol evidence rule to bar any evidence of representations made to Farris, Hunt said the majority ignored the immediately following statute, 28-2-905, MCA. That statute allows evidence to show fraud, and Hunt noted, "The exception to the parol evidence rule for extrinsic evidence of fraud is well established and longstanding ..."

Hunt agreed with the majority to the extent that Farris "did not bring a cause of action specifically alleging fraud." However, he continued, "it should make no difference" whether an action alleges fraud or breach of the implied covenant of fair dealing: "The rationale for the exception to the parol evidence rule applies equally to both situations. In either case, there is an allegation that false representations have been made which can only be proven by evidence extrinsic to the contract."

Hunt would have had the Court "follow the precedent" set in *Stark* (see page 31) and *Prout* (see page 40), as well as the exception to the parol evidence rule, to allow Farris to present her case. "The application of

the parol evidence rule in this case ... is unduly harsh, formalistic, and contrary to the very spirit and rationale upon which the rule is grounded."

Hanley v. Safeway Stores, Inc., Lang, and Rosso (1992) — ***tort, collective bargaining agreement*** *254 Mont.379, 838 P.2d 408*

This case bears a remarkable resemblance to *Foster v. Albertsons* (see page 84). Patricia Hanley worked for Safeway in Butte. Employed there for 25 years, she was a grocery clerk covered by a collective bargaining agreement. In the spring and summer of 1988, Safeway security personnel conducted checker tests; an "impatient customer" would leave exact change for a purchase and leave without waiting for the ring-up. Later, the security people would check register tapes to see if the test purchases were properly rung up. Safeway claimed that Hanley failed seven of eight such tests.

What happened next came under dispute. Safeway said Hanley met with Scott Lang and Doug Rosso, two security employees. In that meeting, she allegedly signed a letter admitting she failed to record some transactions; instead, she would set the money aside and make sure her till balanced at the end of her shift. Hanley claims she was "interrogated" by Lang and Rosso. She said she denied any wrongdoing but was prevented from leaving and was forced to sit back down. According to Hanley, after being detained for over an hour, she signed a coerced confession on the promise that no further action would be taken against her. The next day she was fired.

Hanley filed a grievance through her union; Safeway denied it. The union did not pursue arbitration. About eighteen months later, Hanley filed suit against Safeway, Lang, and Rosso. She claimed false imprisonment, emotional distress, unlawful restraint, intimidation, employer misconduct, and slander. District Court granted summary judgment to Safeway, holding that federal labor law preempted all Hanley's claims. Hanley appealed.

The Supreme Court applied its decision in *Foster* to this case; it held that "a decision on the merits of [Hanley's] claims may be made by the trier of fact without reference to or interpretation of the collective bargaining agreement. The State of Montana has a substantial interest in regulating the conduct alleged in this case and such interests may be protected without interfering with the federal regulation of labor law."

Safeway raised several other issues for consideration in the appeal. The Court, however, restricted its holding to the preemption issue: "Inasmuch as the District Court granted summary judgment based on federal preemption, these [other] issues ... are not properly before this Court at this time." The Court reversed summary judgment and sent the case back to District Court.

Somersille v. Columbia Falls Aluminum Co., Broussard, and Duker (1992) — ***tort, termination agreement*** *255 Mont.101, 841 P.2d 483*

In this case, the plaintiff had signed a termination agreement with the employer, but later decided he didn't like it. He was unable to convince the courts to invalidate the agreement or to allow his lawsuit to proceed.

Revo Somersille was chief financial officer for Columbia Falls Aluminum. In September 1989, the company offered him a termination agreement. Somersille took it under advisement with his attorney and his wife, and four weeks later, he signed it. Under terms of the agreement, Somersille received nine months' severance pay, his portion of profit-shares to be distributed a few months later, and medical insurance for himself and his wife for 18 months. In return, Somersille waived all claims against the company.

One year later, Somersille filed suit, alleging wrongful discharge, fraud, and breach of contract. He contended the termination agreement was fraudulently induced, and that the company had breached its obligations under the profit-sharing plan. The company moved for and received summary judgment in District Court, and Somersille appealed.

The Supreme Court first examined whether the termination agreement was valid and enforceable. Somersille contended the company misled him about the profit-sharing payments. He also claimed that the company knew that his wife's serious illness caused him emotional distress and financial hardship. Given his "economic duress," Somersille claimed the company exerted "undue influence" to get him to sign the agreement, thus "defrauding" him of his just compensation. The Court held that Somersille failed to show any evidence of economic duress, undue influence, or fraud. He had all the necessary facts and the advice of counsel before signing the agreement; the agreement was valid.

The other issue on appeal focused on profit-sharing payments. On that issue, the Court held that Somersille had waived any claims to profit-shares calculated before his termination. However, the Court found, the termination agreement specifically guaranteed Somersille a payment four months after his termination. "The amount to be paid ... was unknown ... on the date of employment termination." The Court found that Somersille had raised a factual issue about whether the later payment was correct. The Court reversed summary judgment on that issue.

*Krebs v. Ryan Oldsmobile (1992) — **WDEA, public policy** 255 Mont.291, 843 P.2d 312*

This case represents the Supreme Court's first major examination of § 39-2-904(1), MCA. This section of the Wrongful Discharge from Employment Act provides that a discharge is wrongful if "in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy."

David Krebs worked for Ryan Oldsmobile in Billings for six months. Six days before his termination on January 10, 1990, Krebs provided information to the Montana Criminal Investigation Bureau about his observations of illegal drug activity among the dealership's employees. Krebs agreed to continue providing information.

The day before his termination, Krebs informed MCIB that the vehicle of a "known fugitive" had been dropped off at Ryan. After Krebs's call, Dick Ryan hit the redial button of the phone and learned Krebs had called MCIB. The next day, the managers and other employees set Krebs up. Pat Ryan announced he was going to meet the fugitive. Employees observed Krebs making a phone call, then hit redial to find out he had called MCIB. Pat Ryan fired Krebs.

In September 1990, Krebs filed a wrongful discharge suit. Ryan responded that Krebs didn't get along with other employees, that he disrupted the operation, and that "various other legitimate business reasons" justified the discharge. District Court determined Krebs failed to present any evidence disproving Ryan's defense that the discharge was for good cause. The court also found that Krebs's conduct as a "paid informant" was not protected by the Wrongful Discharge from Employment Act. Even if it were, said the court, Krebs was not discharged in retaliation for reporting a violation of public policy. District Court granted summary judgment to Ryan, and Krebs appealed.

The Supreme Court first examined the issue of good cause. The Court cited evidence introduced by Ryan to support Krebs's discharge for good cause. However, said the Court, "Krebs also presented evidence tending to show he was not discharged for good cause." Given the conflicting evidence, the summary judgment was inappropriate.

The Court also disagreed with District Court's characterization of Krebs as sort of an undercover police officer. "Krebs was clearly an employee," said the Court. He volunteered information, being neither sought out nor placed by law enforcement. He was not promised payment for his information; in fact, he received only $40 from the MCIB, several weeks after he was fired.

"To hold that an individual who provides information concerning violations of public policy will not be covered by the Wrongful Discharge from Employment Act if they agree to cooperate, even minimally,

with law enforcement," said the Court, "would be to thwart the very purpose of the statute." Under its interpretation, the Court found that "Krebs' conduct was protected under the Wrongful Discharge from Employment Act." Further, said the Court, a "genuine issue of material fact" remained as to whether Ryan fired Krebs in retaliation for that conduct.

The Court reversed District Court's grant of summary judgment to Ryan. Krebs had also moved for summary judgment in District Court; it was denied. The Supreme Court upheld that denial. The case was remanded for trial.

Allison v. Jumping Horse Ranch, Inc. (1992) — ***WDEA, statute of limitations*** *255 Mont.410, 843 P.2d 753*

This case dealt with the statute of limitations (39-2-911, MCA) in the Wrongful Discharge from Employment Act. The Supreme Court interpreted when "termination" actually takes place. It also distinguished this case (and others under the Act) from *Martin v. Special Resource Management* (see page 68).

James Allison managed the Jumping Horse Ranch for 17 years. On July 12, 1988, owner Robert Beck told Allison he would be terminated; Beck said he thought Allison was "burned out" and would soon leave to start his own business. However, Beck asked Allison to stay on until October 1 to help train a new manager. Allison agreed and worked until October 1. On November 3, Beck signed a report for the ranch's pension program that listed Allison's termination date as October 3, 1988.

On September 29, 1989, Allison filed a wrongful discharge complaint against the ranch. At separate times, the ranch moved for summary judgment and a directed verdict, contending that the statute of limitations (one year) had run out by September 29, 1989. Both motions were denied, and Allison prevailed in a jury trial. The ranch appealed.

The ranch argued that the statute of limitations began July 12, 1988, when Beck notified Allison of the termination. The Supreme Court noted that the Wrongful Discharge from Employment Act does not define "termination of employment," so the Court set out to interpret the term. It noted a Kentucky decision that defined termination of employment as "a complete severance of the relationship of employer and employee by a positive act on the part of either or both."

The ranch cited *Martin* in arguing that the statute of limitations began on notice of termination. The Court pointed out that *Martin* was a special case; all the elements of her tort claims had accrued at the time of notice (June 16, 1987), just prior to the effective date of the Wrongful Discharge from Employment Act (July 1, 1987). (Martin's termination took effect July 17, 1987.) In *Martin*, the Court held the Act did not apply at all, so the Act's statute of limitations was not the issue.

In contrast, said the Court, where the Wrongful Discharge from Employment Act does apply "damages do not occur until the employee is no longer earning compensation from the employer ..., and this can only occur upon a complete severance of the employer-employee relationship." In Allison's case, said the Court, Beck's notice to Allison did not completely sever the employer-employee relationship. Allison continued to work for two months, drawing his regular pay and benefits. In addition, Beck had signed the pension report that listed October 1, 1988, as Allison's termination date.

As a result, Allison's "cause of action would not accrue until he stopped earning his salary and benefits." Thus, the filing of Allison's suit on September 29, 1989, was within the Act's one-year statute of limitations; the Court affirmed District Court's denial of the ranch's separate motions for summary judgment and directed verdict.

Hoffman v. Town Pump, Inc. (1992) — ***WDEA, grievance, arbitration*** *255 Mont.415, 843 P.2d 756*

This case dealt with the same section (39-2-911, MCA) of the Wrongful Discharge from Employment Act as *Allison* (above), but on a different issue — the requirement to exhaust internal procedures before going to court. The case also dealt with the award of attorney fees under § 39-2-914, MCA.

David Hoffman began working for Town Pump in 1985. In the first four years of his employment, he managed stores in East Helena and Helena. In June 1989, he took over a store in Hardin; the transfer settled Hoffman's grievance over a hiring issue. A couple weeks later, he transferred to Colstrip to run a store there.

Housing was tight in Colstrip. Hoffman stayed in a motel longer than Town Pump had agreed to pay for. Hoffman was still unable to find housing he could afford, so he lived with his son in his car for two weeks. By Hoffman's account, Town Pump offered no help, despite his requests. By August 19, 1989, Hoffman was fed up: he turned in a letter of resignation, effective August 24.

On the effective date of his resignation, Hoffman filed suit, claiming that Town Pump's constructive discharge of him was wrongful. In the middle of a jury trial, Town Pump moved for and received a directed verdict in its favor. Town Pump's sole defense leading to the directed verdict was that Hoffman had failed to use the employer's grievance procedure before filing suit. The district judge denied Town Pump's request for attorney fees, but later amended his decision, ordering Hoffman to pay $25,000 in attorney fees to Town Pump. Hoffman appealed.

Section 39-2-911, MCA, of the Wrongful Discharge from Employment Act has three subsections: (1) a one-year statute of limitations, (2) a requirement that, before filing suit, an employee exhaust available grievance procedures offered by the employer, (3) a requirement that the employer provide written notice of its grievance procedure within seven days of the date of discharge, or else subsection (2) does not apply. Hoffman based his appeal on the assertion that Town Pump didn't comply with subsection (3), so he didn't have to comply with subsection (2).

The Supreme Court did not agree with Hoffman's argument. Since Hoffman filed suit the same day his resignation took effect, noted the Court, it would have been "impossible" for Town Pump to provide written notice of its grievance procedure within seven days of the date of discharge. Since Hoffman's own actions precluded the notice, he was not excused from using the grievance procedure. The Court stated that, if Hoffman chose to go back and exhaust the grievance procedure, he could then refile his lawsuit.

On the second issue — attorney fees — the Court's holding is unclear. Under the arbitration section (§ 39-2-914, MCA) of the Wrongful Discharge from Employment Act, "[a] party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action ... is entitled ... to reasonable attorney fees subsequent to the date of the offer." Town Pump sent a written offer of arbitration to Hoffman; he rejected it. Town Pump prevailed by directed verdict in the lawsuit. Yet the Court held, "No agreement to arbitrate existed between the parties as required by statute. The award of attorney fees was in error, and therefore, is reversed."

Frazer Education Association v. Board of Trustees, Valley County School District No. 2 (1993) — ***statute, collective bargaining agreement, separate remedies*** *256 Mont. 223, 846 P.2d 267*

The question in this case was whether a dismissed teacher could pursue two avenues of remedy at the same time. The Supreme Court decided he could, and distinguished this case from *City / County of Butte-Silver Bow v. Montana State Board of Personnel Appeals* (see page 25).

The Valley County School District dismissed teacher James Wheeler in September 1990. A couple months later, Wheeler started the process provided in Montana statute by filing an appeal with the county super-

intendent of schools. A hearing was scheduled, then delayed for three months. Wheeler also filed a grievance under his collective bargaining agreement. The district superintendent refused to process the grievance, since Wheeler had a statutory appeal pending.

Wheeler then withdrew his statutory appeal, and his union (Frazer Education Association) filed suit to compel arbitration of the grievance. District Court granted summary judgment for the union. The school district appealed. The issue here was whether a union may pursue a grievance to arbitration, even though the teacher may have initiated a statutory appeal. The Supreme Court recognized this as "essentially the same issue" as in *Colstrip Faculty v. Rosebud County Trustees* (see page 81); however, the *Colstrip* decision was reached on narrow, procedural grounds.

The Court noted that the school district relied on *Butte-Silver Bow* in refusing to hear the grievance. Its interpretation, said the Court, was incorrect: in *Butte-Silver Bow*, the collective bargaining agreement itself provided that a dismissal would be contested through a statutory appeal. Such was not the case here.

The district argued that the legal doctrine of "election of remedies" barred the union from pursuing a grievance once Wheeler filed his statutory appeal. The problem, according to the district, would be defending against two proceedings at the same time, with possibly conflicting results. The union countered that the district could have bargained to restrict available remedies in the collective bargaining agreement, but didn't.

The Court analyzed the election of remedies doctrine. In applying it to the circumstances of this case, the Court found the doctrine did not apply. The doctrine comprises three criteria: 1) the existence of two or more remedies, 2) inconsistency between the remedies, and 3) a choice of one of them. In this case, said the Court, "it is clear that the remedies sought are consistent ..." This finding contradicted the second criterion, making the doctrine of election of remedies inapplicable to this situation.

The Court noted that "a duplication of hearings ought to be avoided when possible, [but] there is nothing in the collective bargaining agreement nor the law of election of remedies which precludes concurrent proceedings in this situation." The holding affirmed District Court, requiring the school district to proceed with Wheeler's grievance.

Three of the seven justices joined in a special concurring opinion. They would have reached the same holding, but only because Wheeler had withdrawn his statutory appeal. This left him "but one remaining remedy available under the terms of the collective bargaining agreement ..." Once the statutory appeal was abandoned, the election of remedies should no longer have been a question for discussion.

*King v. Special Resource Management, Inc., Entech, Inc., and Montana Power Company (1993) — **tort, covenant, procedure** 256 Mont. 367, 846 P.2d 1038*

This appeal from a jury verdict focused on procedural questions. In its decision, the Supreme Court overruled a 1976 decision and "changed the rules" for contesting some peremptory challenges in juror selection.

James King began working for Montana Power (MPC) in 1980. After about six years, he transferred into Special Resource Management (SRM), a subsidiary of Entech, which is a subsidiary of MPC. After 15 months at SRM, King lost his job through a reduction in force in July 1987. He filed suit, claiming breach of the covenant of good faith and fair dealing. (King had been notified of the termination before July 1, 1987, so the Wrongful Discharge from Employment Act did not cover his claim.)

Prior to trial, District Court granted eight peremptory challenges to the three defendants — twice the normal number of four. A peremptory challenge allows a party to reject a potential juror without any explanation. The reason for the additional challenges in this case was the companies' "diversity of interests."

Over King's objection, the trial proceeded. After all the evidence had been heard, the judge directed verdicts acquitting Entech and MPC of any liability. The jury then determined that SRM had not breached the covenant of good faith and fair dealing. King appealed.

The appeal focused on whether the extra peremptory challenges should have been allowed. King argued that the law allows additional peremptory challenges only when "hostility," not diversity, existed among the multiple defendants. The companies claimed that hostility did exist, and besides, in order for King to successfully contest the extra challenges, he would have to show that the action prejudiced him. The need to show prejudice had been set forth in an earlier Supreme Court decision, *Leary v. Kelly Pipe Co.* (1976, 169 Mont. 511, 549 P.2d 813).

The Court re-examined the rule and found it had no way to determine whether prejudice had occurred once a jury trial had started "without invading the internal process of a jury." So the Court overruled the *Leary* rule, saying if extra peremptory challenges were improperly granted, "prejudice is presumed as a matter of law." And the extra challenges can be granted only when the multiple parties on one side are hostile to one another.

In this case, the Court held that "diversity" was not the same as "hostility"; District Court's grant of extra challenges based on diversity of interests among the companies was incorrect. The Court didn't buy SRM's contention that hostility did exist: "All three defendants acted in concert, with no hostility exhibited by their efforts to prevent a verdict against SRM." The Court reversed the jury's verdict, entitling King to a new trial.

The Court upheld the directed verdicts in favor of Entech and MPC. King had argued that the reversal returned all parties to their positions before the trial. The Court, however, held that the jury was not involved in the directed verdicts, only in the verdict acquitting SRM. The error leading to a new trial had involved the selection of the jury, so only SRM had to defend itself in a new trial.

Miller v. Glacier County, Big Springs, Koepke, & Johnson (1993) — ***grievance, collective bargaining agreement, separate remedies, § 1983*** *257 Mont. 422, 851 P.2d 401*

In this case, the Supreme Court again addressed a question of "multiple remedies" for contesting a discharge. The Court's analysis was complicated by the fact that it involved both federal and state law, and the record did not contain a copy of the collective bargaining agreement needed as part of the analysis.

Robert Miller worked for Glacier County Medical Center from July 1979, to October 1984. The hospital fired him for misconduct. Miller filed a grievance through his union, and he also filed a lawsuit against the Glacier County, owner of the hospital. The lawsuit alleged wrongful discharge, breach of the covenant of good faith and fair dealing, and defamation, with later amendments that claimed wrongful discharge in violation of public policy and denial of due process under 42 USC § 1983 (1872 Federal Civil Rights Act). Because Miller had already initiated his grievance, the county sought to have the lawsuit dismissed.

Miller's grievance went all the way to arbitration. In June 1985, the arbitrator decided in favor of the county, ruling that Miller had been fired for insubordination. The lawsuit dragged on through discovery for seven years. (In all the discovery activity, a copy of the union contract was never placed in the record.) In May 1992, District Court granted the county's motion to dismiss. Miller appealed.

Miller contended his claims were not based on the collective bargaining agreement and were not proper for consideration by the arbitrator. The county argued that Miller's lawsuit was preempted by federal labor law. The Supreme Court noted, "The issue before us directly involves the collective bargaining agreement .... The record before us does not include a copy of that contract." So, rather than reach a controlling decision, the Court decided to "review pertinent legal principles" to assist District Court when it got the case back.

The Court noted that "collective bargaining agreements must be interpreted by application of federal law, not state law." The Court referred to *Foster v. Albertsons* (see page 84) to reiterate that some claims may require resolution under state law. However, if the collective bargaining agreement contains a clause that "any controversies" will be subject to arbitration, such a clause enables the arbitrator to consider issues beyond those covered by the federal law, such as Miller's tort claims. If the contract lacks the "any controversy" clause, the arbitrator is confined to using federal law to interpret the contract, and other claims may proceed in court.

Miller's § 1983 claim garnered special notice; the Court cited precedent from the U.S. Supreme Court that arbitration is an inadequate substitute for litigation on a § 1983 claim. Even if an arbitrator decides on the issue, the claim may still be pursued through litigation. The Court concluded, "Clearly, Miller's § 1983 claim must be considered by the District Court. Because of the absence of a copy of the collective bargaining agreement, we are not able to comment on which of Miller's state-law claims may be justiciable in District Court." The Court sent the case back for further consideration in light of the guidance in this opinion.

Minnie and Minnie v. City of Roundup and Knudsen (1993) — § 1983 257 Mont. 425, 849 P.2d 212

This case again involves § 1983 of the 1872 Federal Civil Rights Act. Joan Minnie worked for the City of Roundup for several years, first as city water clerk, then city clerk from 1979 until her termination in July 1990. Joan and her husband, Ken, filed this suit against the city and 13 individuals, including Knudsen, the city attorney. The suit contained several claims: wrongful discharge under the Wrongful Discharge from Employment Act, breach of the covenant of good faith and fair dealing, negligent infliction of emotional distress, intentional infliction of emotional distress, loss of consortium, and violation of constitutional rights under 42 USC § 1983.

District Court granted the city's motion for summary judgment on all claims. The court held the wrongful discharge claim barred under the statute of limitations. In addition, the Minnies' allegations in their § 1983 claim failed to create a question of fact. The Minnies appealed only with respect to the city; all other defendants were dismissed from the suit.

The Supreme Court considered only the issue of the § 1983 claim. The Court held the summary judgment on that claim improper "because the record is devoid of the required showing of proof entitling Roundup to judgment." With a motion for summary judgment, the city was obligated to support the motion with evidence. "Roundup presented nothing outside its responsive pleading and the argument of counsel to support its summary judgment motion." Thus, the Court reversed summary judgment on the § 1983 claim.

Lueck v. United Parcel Service (1993) — collective bargaining agreement, exhaustion of remedies, damages 258 Mont. 2, 851 P.2d 1041

In this case, the Supreme Court acknowledged *Foster v. Albertsons* (see page 84), but reaffirmed a portion of an earlier decision, *Brinkman v. State* (see page 24). The Court also addressed the issue of a retaliatory discharge for filing a workers' compensation claim and the issue of an "adverse stress reaction" as an "injury" under the Workers' Compensation Act. On all issues, the Court affirmed summary judgment in favor of United Parcel Service (UPS).

Craig Lueck began working for UPS in April 1984. As a driver, he joined the Teamsters Union. Several schedule changes took place over the course of four years, and in May 1988, Lueck was assigned a "swing run" out of Glendive. Lueck found the new schedule difficult and complained to his bosses about losing sleep. One day in June 1988, Lueck "flipped out" and left work. He was treated in a hospital for a couple days, then began outpatient counseling for what was described as a "physical/psychological adverse stress

reaction" to working the swing shift. His doctor concluded, at least at first, that he would be unable to work that type of shift again.

Lueck filed a workers' compensation claim. It was denied, and he did not appeal. He filed a disability claim with the Teamsters, but it was denied because he had started playing weekend gigs with a band. His doctor reported on the union claim that Lueck could return to work October 11, 1988. UPS found all this out and tried to get Lueck back to work. After several futile attempts, the company fired Lueck in December 1988. A year later, Lueck filed suit, claiming UPS had fired him in retaliation for filing the workers' compensation claim. He also alleged that UPS had intentionally inflicted emotional distress when it ignored his complaints about the swing shift. He later amended his complaint to include a claim that UPS had failed to give him preference for another job, as required by the Workers' Compensation Act. District Court granted summary judgment to UPS, and Lueck appealed.

The Supreme Court upheld summary judgment on the claim of retaliatory discharge because Lueck "failed to exhaust the remedies available to him under the collective bargaining agreement ...." The Court noted that the *Foster* case overruled a part of the *Brinkman* decision, but held that "to the extent that *Brinkman* requires an employee subject to a collective bargaining agreement to exhaust his remedies under that agreement, it is not overruled." Lueck had tried once to meet with a Teamsters representative, but when the union official didn't show, Lueck made no further efforts to use the grievance procedure.

The Court noted that "[e]ven if Lueck had gone through the prescribed grievance procedure, however, his retaliatory discharge claim would fail for lack of evidence. ... UPS amply documented its efforts to persuade Lueck to return to work, which were justified by the information it had at the time. From UPS's point of view, Lueck simply abandoned his job without providing a coherent explanation and without filing a grievance after he was discharged."

Lueck's amended complaint concerned a UPS vacancy in March 1989. He asserted that UPS was required by law to prefer him for the job, but it did not notify him of it. District Court had dismissed the claim, saying Lueck was not "injured" under the law's definition, and anyway, he had not applied for the preference. The Supreme Court agreed that Lueck's "adverse stress reaction" was not a compensable injury, and it rejected Lueck's argument that he suffered from an occupational disease.

Lueck's claim of intentional infliction of emotional distress likewise got nowhere. The Court noted, "In the past we have characterized emotional distress as an element of damages rather than a distinct cause of action .... Even if considered only for the purpose of establishing damages, however, Lueck's deposition testimony demonstrates that absence of any genuine issue of material fact concerning the severity of his alleged emotional distress."

Weber v. State of Montana (1993) — ***WDEA, damages, costs*** *258 Mont. 62, 852 P.2d 117*

This was Weber's second appeal in his wrongful discharge suit against the state (see page 82). This go-around focused on a couple technical issues: 1) was Weber entitled to interest on the judgment he received? 2) Did the state have to pay half the cost of the trial transcript used in the first appeal? The answers, respectively, were "no" and "yes."

The jury in Weber's trial awarded $33,230 in damages and $3,828 in costs. Weber sought an additional $6,000 in interest. Relying on § 2-9-317, MCA, District Court disallowed any interest on the award. The statute prohibits any interest on a judgment that is paid within two years of its entry. On appeal, Weber attacked the constitutionality of the statute; he contended it was a statutory grant of sovereign immunity, which requires a two-thirds vote of each legislative house on passage. Since § 2-9-317, MCA, was adopted by simple majority votes in 1977, Weber argued, it was invalid.

The Supreme Court disagreed: "Section 2-9-317, MCA, is not a sovereign immunity statute. ... [I]nterest is a separate issue from the cause of action. And it is only the cause of action which is involved with sovereign immunity." The Court upheld the denial of interest on Weber's award.

The Court also upheld the order that the State pay half the $6,000 cost of the trial transcript used in the first appeal. Because the state had cross-appealed and because both parties were partly successful in the first appeal, said the Court, splitting the cost of the transcript was appropriate.

Tonack v. Montana Bank of Billings (1993) — ***WDEA, exemption*** *258 Mont. 247, 854 P.2d 326*

This decision arose from a lawsuit in which the plaintiff had successfully recovered damages under both the Wrongful Discharge from Employment Act (WDEA) and the federal Age Discrimination in Employment Act (ADEA). The Supreme Court took another look at the exemption in the WDEA at 39-2-912, MCA (see appendix).

Betty Tonack began working for Montana Bank in Sidney as a teller in 1981. In 1988, she transferred to the affiliate bank in Billings and took a promotion to Financial Services Representative (FSR). An evaluation in early 1990 showed her performance as fully satisfactory, and her job was expanded to include supervision of tellers. In May 1990, Lynette Kiedrowski became Tonack's new supervisor. Kiedrowski put Tonack on probation the following August due to a theft in the bank; however, the theft had occurred in an area outside Tonack's supervision and while she was on vacation. Kiedrowski also cut Tonack's job back to just the FSR duties.

Kiedrowski apparently was grooming another person, newly hired, for Tonack's FSR job, and she told Tonack to train the person to serve as backup. Tonack scheduled the training, but postponed it when nobody showed up to cover the trainee's regular job. The new person then quit. Kiedrowski was out of town at the time, but when she returned, she fired Tonack. The other person then withdrew her resignation and was placed in Tonack's job.

Tonack filed suit, and in a bench trial, District Court decided the bank had violated both the WDEA and the ADEA. Tonack was awarded the maximum four years' wages and benefits under the WDEA and damages under the ADEA running to her expected date of retirement.

On appeal, the bank challenged certain findings of fact concerning the ADEA claim. The Supreme Court reviewed the record extensively and concluded that substantial evidence supported the District Court's findings.

The bank also argued that Tonack failed to show that the bank's stated reasons for firing her were a pretext for age discrimination. In a discrimination case, the employee must build a credible case that discrimination occurred. The employer then presents a nondiscriminatory reason for its action. The burden then shifts back to the employee to prove that the employer's reason was a pretext for actual discrimination. In this case, the Court found that "Tonack provided evidence to disprove the legitimate explanation offered by the bank." The evidence included her satisfactory evaluations, testimony that the bank system president wanted her out because of her age, the false basis of her probation, and clear indication that the bank was grooming a much younger person for Tonack's job.

Third, the bank contended that § 39-2-912, MCA, prohibited Tonack from recovering damages under both the WDEA and the ADEA. The statute is a section of the WDEA and exempts a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute." Tonack cited to federal District Court pretrial orders allowing concurrent actions under both the WDEA and the ADEA when separate facts support each claim (*Vance v. ANR Freight*, D. Mont., 9 Mt. Fed. Rpts. 36; *Higgins v. Food Services of America*, D. Mont., 9 Mt. Fed. Rpts. 529). The Supreme Court demurred, "We decline to completely follow those decisions, exercising our prerogative as the ultimate authority on the interpretation of Montana statutes."

The statute, said the Court, exempts the WDEA from "'a discharge' subject to other statutes. It does not provide that the Act applies to all factual claims not covered by other statutes. Tonack's claims ... relate to *one* discharge from employment at the bank. We conclude that Tonack may not recover under both the ADEA and the Wrongful Discharge from Employment Act."

With this ruling, the Court clarified its holding in *Deeds v. Decker Coal* (see page 67). Because a person may not know immediately what remedies apply, "claims may be filed under the Wrongful Discharge from Employment Act and other state or federal statutes ..., but if an affirmative determination of the claim is obtained under such other statutes, the Wrongful Discharge from Employment Act may no longer be applied." The Court remanded this case for recalculation of damages, excluding those under the WDEA.

Beasley v. Semitool, Inc., Semitherm, Inc., and Thompson (1993) — ***WDEA, contract, tort, separate remedies*** *258 Mont. 258, 853 P.2d 84*

Similar to *Tonack v. Montana Bank* above (and decided on the same day), this case involves concurrent claims for damages, but the results are different. Here, the Supreme Court ruled that a plaintiff may pursue contract claims arising in the employment context separate from a discharge.

L. Michael Beasley went to work for Semitool in June 1986. He left a job in Kentucky to accept Semitool's offer; Beasley claimed Semitool orally promised him stock options, bonuses, and opportunities for advancement. Beasley apparently did an excellent job for Semitool, and in November 1987, he transferred to Semitherm, a sister corporation. Again, according to Beasley, he received oral promises of raises, bonuses, and stock options. In January 1989, Beasley quit over the company's failure to keep its promises.

Beasley filed suit, claiming breach of express and implied contract, breach of the covenant of good faith and fair dealing, and wrongful discharge. Semitool asked for — and received — summary judgment on grounds that the Wrongful Discharge from Employment Act (WDEA) was the only remedy available to Beasley, and that he had no grounds for relief under the Act. Beasley appealed; in the process, he dropped his wrongful discharge claim, as he had landed a high-paying job in Texas.

The summary judgment had been grounded on § 39-2-913 of the WDEA, which preempts common law remedies: "Except as provided in this part, no claim for discharge may arise from tort or express or implied contract." Beasley argued that his contract claims stemmed from Semitool's failure to pay him as promised; the damages occurred, he said, prior to his resignation.

The Supreme Court agreed: "We conclude that § 39-2-913, MCA, bars claims *for discharge* arising from tort or implied or express contract, but does not bar all tort or contract claims merely because they arise in the employment context." The Court allowed that Beasley's complaint was somewhat confusing, but still found that he had made separate claims arising from separate circumstances: "Beasley's reliance in his complaint on the same set of facts for his three causes of action does not require dismissal of the alleged independent contract-based claims." The Court remanded the case for further consideration of Beasley's contract claims.

Mannix v. Butte Water Company and Washington (1993) — ***tort, procedure*** *259 Mont. 79, 854 P.2d 834*

After the first appeal in this case (see page 76), Gary Mannix's claim went to trial in August 1991. During the trial, the district judge directed verdicts clearing the water company of wrongful discharge and breach of the covenant of good faith and fair dealing. The judge also ruled out any punitive damages. The jury came back with a special verdict finding that the water company board of directors had a sound basis to conclude that retaining Mannix as president was no longer in the company's best interest. Mannix appealed on several issues.

Mannix contested District Court's refusal to allow hearsay evidence — conversations he had with parties familiar with the situation before his termination. The Supreme Court noted that the evidence Mannix sought to present was admitted through other testimony, so District Court had been right to stand by the general rule to disallow hearsay evidence.

The trial had taken place in Flathead County, after the water company requested a change in venue from Silver Bow County. Mannix contested the move on appeal. The Court reviewed the news coverage the case had received in the Butte area and concluded that District Court had not abused its discretion in granting the change in venue.

The third issue involved testimony by a "lay witness" — a member of the water company board until just after it changed hands. In examination, he was asked his opinion about the interest of the company in retaining Mannix as president. The defense objected to the question, and District Court sustained the objection. The Supreme Court noted that his opinion would have been allowable if it were to help the jury determine a fact at issue. However, since the person "was not a member of the board that made the decision [to terminate Mannix], his opinion was irrelevant and inadmissible."

District Court had also disallowed testimony by an expert witness, a labor relations consultant. In deposition, the consultant had admitted a lack of experience in corporate law or the termination of corporate officers. Using this information, the defense had moved to exclude the consultant's testimony on the grounds he was not qualified. District Court granted the motion, and the Supreme Court affirmed it.

Mannix also contested District Court's dismissal of his claim the company had breach the covenant of good faith and fair dealing. The Supreme Court was willing to assume that the covenant supplemented the law on removal of corporate officers. However, the Court also referred to *Dare v. Montana Petroleum* (see page 12); in that case, the Court had held that existence of the covenant in a given situation hinges on "objective manifestations" of job security. Mannix argued that 12 years of service, several raises, and praise from peers and superiors established objective manifestations. He also admitted that he realized his job as president was subject to the discretion of the board. The Court held that Mannix "presented no evidence of objective manifestations," and the dismissal of the claim was proper.

Finally, Mannix argued that District Court had erred in excluding a jury instruction he had proposed. The particular instruction would have established a connection between the right of the corporate board to remove and officer and the need to relate the termination to a legitimate business interest. The Supreme Court, though, held, "When read as a whole, the instructions sufficiently instructed the jury as to the scope of the board's judgment."

Justice Trieweiler dissented in two areas. He would have allowed the "lay testimony" by the former member of the water company board. Secondly, he would have required the jury instructions to state an affirmative duty owed to Mannix by the water company board.

Arnold v. Boise Cascade Corporation (1993) — ***WDEA, statute of limitations, damages***
259 Mont. 259, 856 P.2d 217

This appeal followed a jury verdict in favor of the plaintiff, Willard Arnold. At issue in the litigation was the factual question of the date of Arnold's termination by Boise Cascade.

Boise Cascade's personnel policy provided for "temporary curtailment leave" in the event of reduced demand for labor. The policy said the company would reinstate an employee on temporary leave when work increased; if the leave extended to six months, employment would terminate with severance pay and written notice of the termination (or two weeks' pay, in lieu of the notice).

Arnold began working for Boise Cascade at its mill in Billings in July 1982. In February 1988, Boise Cas-

cade placed Arnold on temporary leave, with the likelihood he would be recalled within two months. In April 1988, Arnold took a lower paying job with another company. He also went to Boise Cascade and requested his vacation and retirement payout. Boise Cascade later contended that Arnold's action meant he was voluntarily terminating employment. Thus, when six months of temporary leave had gone by, the company never pursued the involuntary termination described in its policy.

Arnold, however, thought otherwise; he was still waiting to be recalled to work. In March 1990, he learned that Boise Cascade was going to fill his job. He asked about it and was told he had to apply for it. The company hired another person for the job. In January 1991, Arnold filed suit, claiming that Boise Cascade had wrongfully discharged him when it didn't recall or rehire him in March 1990. Arnold prevailed in a jury trial and was awarded $41,920 in damages.

Boise Cascade had argued that Arnold had voluntarily quit. And even if he hadn't, his employment had ended in August 1988, when his temporary leave had reached six months. Under the one-year statute of limitations in the Wrongful Discharge from Employment Act (WDEA), then, he had only until August 1989, to file suit. The company claimed it was an error to interpret the statute of limitations as running from March 1990, when Arnold failed to get his old job back; the company claimed it had no obligation to hire him at that time.

On appeal, the Supreme Court found that the time and circumstances of Arnold's termination were "questions of fact that were properly presented to the jury." Noting that "it is not the function of this Court to agree or disagree with the jury's verdict," the Court held that substantial evidence supported the finding that the statute of limitations did not bar Arnold's claim.

Boise Cascade also disputed Arnold's testimony at trial regarding the amount of damages. The company said he was not a "labor economist" and was not qualified to calculate the value of fringe benefits. (The WDEA provides for "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge.") The Court reviewed Arnold's testimony and noted that he had documented his wages with W-2 forms; he also admitted that the stated value of his benefits were approximations. "Considering the testimony as a whole," said the Court, "we do not find it unreasonable that the [district] court allowed Arnold to testify about his wages and benefits ... and the amounts he earned after Boise refused to rehire him."

Boise Cascade also disputed evidence of damages presented by Arnold's attorney during summation at trial. The Court's review, though, found credible support for the damages presented. Anyway, said the Court, the jury's award was different than Arnold's or his attorney's damage estimates; "In light of the jury's obvious ability to consider the evidence as a whole and make its own determination of damages," said the Court, "we conclude there was no abuse of discretion when the [district] court allowed the challenged summation."

Finally, Boise Cascade challenged the District Court's instruction to the jury defining discharge. The company had wanted the instruction to include the full definition of discharge from the WDEA; the actual instruction used said, "Discharge includes termination of employment including resignation, failure to recall or rehire." Boise Cascade said this instruction precluded the jury from finding that Arnold was discharged by a different means and at a different time than the two circumstances advanced in court. On the contrary, said the Court, the instruction got to the heart of the dispute: did Arnold resign or did Boise Cascade terminate his employment? The instruction was proper to the case.

Talley v. Flathead Valley Community College (1993) — ***contract, tort, covenant, due process*** *259 Mont. 479, 857 P.2d 701*

Frank Talley brought number of contract and common-law issues to the Court in his appeal of summary judgment against him at the District Court level. He didn't get very far with any of them.

Talley was a part-time instructor at Flathead Valley Community College (FVCC) for 24 school terms from 1982 to 1989. His employment for each of the terms was covered by a written contract. When FVCC cut his classes due to low enrollment, he filed suit, claiming the college was retaliating against him for speaking out against policies and for union activity.

First of all, Talley argued he had gained tenure under § 20-4-203, MCA. FVCC said that statute did not apply to community college instructors. The Court agreed: "... §20-4-203, MCA, does not control tenure for instructors at any community college in Montana."

Next, Talley claimed a "reasonable expectation of continued employment," based on oral statements and a "property right" in his position. The Court referred to *Farris v. Hutchinson* (see page 86) and *Medicine Horse v. Big Horn* (see page 78) in discounting Talley's claims: "We conclude that the contract between FVCC and Talley is clear and unambiguous ... and creates no expectations of continuing employment." The Court applied the same reasoning in upholding dismissal of Talley's claim that FVCC breached an implied covenant of good faith and fair dealing. Talley's additional claims that he was denied equal treatment and due process met the same end in court.

Talley's case was remanded on one issue. He claimed FVCC had violated due process with regard to his right of free speech. Specifically, the college had sent him a letter during the litigation, saying it would consider him for rehire if he stopped saying he had a right to or expectations of continued employment. This issue became the subject of another appeal (see page 122).

Kestell v. Heritage Health Care and Sterling Corporation (1993) — ***WDEA, constructive discharge, good cause, damages*** *259 Mont. 578, 858 P.2d 3*

This case addresses several issues under the Wrongful Discharge from Employment Act: constructive discharge, legitimate business reason as good cause for dismissal, and damages.

John Kestell began working in 1989 at Glacier View Hospital in Kalispell as director of the chemical dependency unit. After six months, his performance evaluation noted some areas of strength and some areas needing improvement, but no areas that were unsatisfactory. Eight months after hiring him, Kestell's bosses told him they were eliminating his position and offering him another one. They contracted with an outside corporation to manage the chemical dependency unit, which then placed another person in charge of the unit. In the meantime, Kestell came to "work" but had nothing to do. The hospital offered Kestell much lower paying jobs. Kestell threatened legal action, and the hospital took the position that he was not wrongfully discharged because his job was eliminated. Kestell quit and, a few months later, filed suit. The case went to a jury trial, and Kestell prevailed. The jury awarded damages of $123,600.

On appeal, the hospital argued that Kestell hadn't been discharged — and if he had, it was for a legitimate business reason. The Court examined the issue of constructive discharge and found the evidence showed "that Kestell, a highly qualified professional and experienced supervisor, was abruptly removed from his post, isolated in a different wing of the hospital, and deprived of meaningful activity." So, said the Court, there was "sufficient evidence for the jury to determine that the hospital rendered Kestell's working conditions intolerable."

The hospital maintained though, that it had a legitimate business reason for eliminating Kestell's position — to contract out his duties and thus improve the performance of the hospital. However, the evidence showed that the contracting corporation put a less qualified person in the position at the same rate of pay and with the same job description. His personnel records were kept at the hospital, and his business card depicted him as an employee of the hospital. "In short," said the Court, the person "simply assumed Kestell's position in the hospital, and ... the position was not eliminated or even substantially changed."

The Court referred to *Cecil v. Cardinal Drilling* (see page 65) and *Buck v. Billings Montana Chevrolet* (see page

70) as precedent regarding legitimate business reason. "The legitimate business reasons that justified termination in *Cecil* and *Buck* are absent here" said the Court. "Kestell presented evidence that the hospital's ostensible reasons for replacing him were false, arbitrary, or capricious and unrelated to the needs of the business ..."

On the final issue of the appeal, the hospital said the damages awarded by the jury were excessive. The Court reviewed the Wrongful Discharge from Employment Act's provision for a maximum of four years lost wages and benefits, reduced by the amount the plaintiff earned or could have earned. The Court also acknowledged the trier of fact's role in setting damages (see *Weber v. State of Montana*, page 82). Here, the Court did some quick math and found that "the jury clearly took into account Kestell's testimony on interim earnings; otherwise, the award would have been higher." The jury "reduced the maximum award ..., $230,400, ... and awarded only $123,600." The Court concluded this damage award was not excessive.

Walch v. University of Montana and State of Montana (1993) — ***tort, covenant, statute of limitations*** *260 Mont. 496, 861 P.2d 179*

This case stemmed from a discharge that predated the Wrongful Discharge from Employment Act. The issue was the statute of limitations for tort actions, and here the Court distinguished *Martin v. Special Resource Management* (see page 68) from *Allison v. Jumping Horse Ranch* (see page 90).

Richard Walch worked at the U of M physical plant from May 1978 to September 9, 1986. He received a letter on August 6, 1986, that his position was being cut due to budgetary constraints. The letter said his last day of work would be September 9. Walch filed his complaint alleging wrongful discharge and breach of the implied covenant of good faith and fair dealing on September 5, 1989. The university sought and obtained summary judgment that Walch's complaint was filed beyond the three-year statute of limitations allowed for tort actions. Walch appealed.

The Court agreed with District Court that the *Martin* case was controlling in this instance. Walch argued that *Martin* was not a statute of limitations issue, but an issue of whether her case could proceed in tort or was covered by the Wrongful Discharge from Employment Act. In the *Martin* case, the Act took effect between the time she received notice of termination and when the termination actually took effect. The Court held that the alleged tort accrued at the notice of termination, so Martin's case could proceed in tort.

Walch argued that *Allison* should control. In that case, Allison filed suit more than one year after receiving notice of termination but less than one year after the termination took effect. The Court held that the one-year statute of limitations under the Wrongful Discharge from Employment Act begins running upon complete severance of employment. Here, the Court said the *Allison* case was "not on point."

The distinction is that Walch and Martin filed tort claims, and the Court held that tort accrues upon notice of termination, thereby triggering the three-year statute of limitations. Allison's case, however, fell under the Wrongful Discharge from Employment Act and its specific provision that a claim may be filed within one year of the date of discharge. "We conclude," said the Court, "that [Walch's] cause of action, which was filed on September 5, 1989, accrued on August 6, 1986, and was barred by the statute of limitations ... which allows three years to file from the date on which the cause of action accrued."

Carbon County School District No. 28 v. Spivey (1993) — ***due process*** *262 Mont. 513, 866 P.2d 208*

This case involved termination of a teacher's contract for cause, and it got about as complex as one of these normally complex cases can get. Because it went through several levels of review, the Supreme Court found it necessary to clarify the "standard of review."

Helen Spivey taught at a one-room school in Carbon County for eight years. Parental complaints and oth-

er evidence of insubordination led the school board to terminate her contract on March 31, 1986. Spivey appealed to the county superintendent of schools, who overturned the dismissal and ordered Spivey reinstated. The school district appealed to State Superintendent Ed Argenbright, who reversed the county superintendent. Spivey appealed to District Court. The court held that the state superintendent erred, basing his decision on evidence that had been excluded from the county superintendent's hearing, and that the evidence had been improperly excluded at that level. The court sent the case back to the county superintendent, and it started all over again.

On remand, a different, acting county superintendent of schools considered the case de novo. The county superintendent concluded there was just cause for Spivey's termination. Spivey appealed to the state superintendent, who by now was Nancy Keenan. Keenan reversed the county superintendent's decision, and the school district appealed to District Court. The court determined that the evidence supported the termination and reversed Keenan's decision. Spivey appealed to the Supreme Court, which received briefs more than seven years after the initial school board decision.

The Court acknowledged that the several levels of review "caused a great deal of confusion" about the proper standard of review. The Court undertook "to clarify this area of the law," and examined the relevant regulation (ARM 10.6.125) and statute (§ 2-4-704, MCA). "The salient points of both," said the Court, "are that the reviewing body may not substitute its judgment for that of the lower body as to the weight of the factual evidence and that the reviewing body may affirm, remand, reverse or modify the prior decision. Both [rules] require reversal or modification ... if substantial rights of the appellant have been prejudiced because of certain errors in the lower body's findings and conclusions."

Turning to Spivey's case, the Court noted that "[t]he major cause of confusion ... is whether ... a District Court should review the decision of the county superintendent or the decision of the state superintendent." The Court held that District Court must review the decision of the state superintendent. But to do so, the court must review the county superintendent's decision to see if the state superintendent correctly affirmed or reversed it. Here, the District Court had found the county superintendent's decision was based on substantial evidence and that the state superintendent substituted her judgment for the county superintendent. The Supreme Court agreed.

The Court also affirmed the holding that the de novo review at the county level second time around was proper. A few issues regarding this review were discussed in the Court's decision, and it upheld the District Court on all of them. As the final result, Spivey stayed fired.

Logan v. Yellowstone County, Metrapark, and Metrapark Board (1994) — ***tort, workers' comp*** *263 Mont. 218, 868 P.2d 565*

Mabel Logan worked as a switchboard operator at Metrapark. Because the position was eliminated, she lost her job on June 30, 1987, but the county then employed her as a control operator at the Yellowstone County Jail. At the new job, she suffered a repetitive motion injury to her hands. She recovered workers' compensation for the injury.

Logan sued the county under tort theories of wrongful discharge. Her reasoning was that her discharge from Metrapark was the proximate cause of her injury at the jail. She would have kept working at Metrapark, if possible, and county could have reasonably foreseen that the new job would cause her injury. Therefore, she was wrongfully discharged from the Metrapark job.

District Court granted summary judgment to Yellowstone County, ruling that Logan's discharge was not the proximate cause of her injury, nor was the injury foreseeable. The court also held that workers' compensation was the exclusive remedy for Logan's injury. The Supreme Court affirmed.

Phillips v. Trustees, Madison County School District No. 7 and Keenan (1994) — ***due process, evidence*** *263 Mont. 336, 867 P.2d 1104*

This teacher termination case focused on what evidence the county superintendent may consider when reviewing the school board's decision.

Hazel Phillips taught English and Art in the Madison School District for 16 years. When a financial crunch hit the district, the school board eliminated her position and terminated her contract. Phillips claimed that the termination was really based on a personality conflict between her and the district superintendent of schools.

The county superintendent of schools reversed the termination, concluding that the conflict, and not the financial crisis, had led to an unjust termination. The state superintendent of public instruction, Nancy Keenan, affirmed the county superintendent's decision. The school district appealed to court. At this point, the parties agreed that the state superintendent's review had been based on an incomplete record, so the court sent the matter back to Keenan for reconsideration.

Keenan's second review determined that the county superintendent had improperly considered evidence relating to school district finances. This was improper, said Keenan, because the information had been unavailable to the school board when it accepted the recommendation to terminate Phillips's contract. Thus, Keenan reversed the county superintendent's decision. Phillips appealed to District Court.

District Court ruled that the hearing with the county superintendent was de novo. Therefore, she could consider any evidence available to her, including the financial information admitted at the hearing without objection from the school board. "Consequently, the District Court reversed the decision of the state superintendent and reinstated the county superintendent's decision that had reversed the trustees' decision to terminate Phillips' contract" (a direct quote from opinion).

The Supreme Court affirmed. However, two justices filed a special concurrence, and two justices dissented. The special concurrence pointed out the "impossible position" facing trustees. That is, their decision could be reversed on consideration of evidence not even in existence at the time of the decision. Still, said the concurrers, "we should err on the side of allowing more relevant information on the issue rather than less." The dissenters took the stance "that post-termination evidence — that is, evidence which did not exist at the time a termination decision was statutorily required — is not relevant and, therefore, cannot be used by a county superintendent in reviewing a termination decision."

Morton v. M-W-M, Inc. (1994) — ***WDEA, summary judgment*** *263 Mont. 245, 868 P.2d 576*

The Court's decision here was to reverse summary judgment and remand this wrongful discharge case to District Court. At issue was whether any material issues of fact abided in the lawsuit.

Gina Morton worked as a part-time assistant manager at Burger King in Great Falls. M-W-M was the franchise owner. When Morton became eligible for paid vacation leave, she requested two weeks in May 1990. She said she wanted to tend to her family while her husband was in job training. She also put in her work schedule requests for the remainder of May. The same day, she applied to work at the Black Angus Restaurant in Great Falls.

Burger King allowed "moonlighting" as long as other jobs didn't interfere with one's work schedule at Burger King and as long as the other jobs weren't with Burger King competitors. The manager at Burger King heard Morton was working at Black Angus, and he checked it out personally. He then fired Morton without explanation.

Morton filed suit, and M-W-M moved for summary judgment on the grounds it had good cause for the

termination: Morton didn't make herself available for part-time work, she moonlighted for a competitor, and she was dishonest. Morton contended that Black Angus was not a competitor. She also said her situation had changed after she was granted the vacation leave, so she went to work at Black Angus. District Court granted summary judgment to M-W-M, and Morton appealed.

The Supreme Court noted, "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Here, such issues of fact precluded summary judgment, said the Court. Interestingly, the Court noted that the District Court judge "specifically asked counsel for Morton whether any disputes of fact were involved in this case; Morton's counsel replied that there were none. That reply was erroneous."

The Court noted at least three material issues of fact: whether Morton requested her vacation according to Burger King policy, whether Morton misled her manager, and whether Black Angus was a competitor to Burger King. The Court reversed summary judgment and remanded the case.

Kearney v. KXLF Communications, Inc. (1994) — ***WDEA, good cause, policy***
263 Mont. 407, 869 P.2d 772

This case presents the Supreme Court's first look at a provision in the Wrongful Discharge from Employment Act that makes a discharge wrongful if the employer violates its own written personnel policy.

Pat Kearney began working as a reporter for Butte television station KXLF in 1981. In 1986, the station named him news director. At the time, KXLF operated within a network arrangement among four Montana stations. News broadcasts were anchored in Billings, with local segments inserted at other stations. Butte segments were under Kearney's direction.

In 1988, KXLF management decided to convert to a completely local newscast. The station's general manager felt that Kearney couldn't handle the increased responsibilities. He had noted Kearney's conflicts with other staff members and problems controlling his temper. He told Kearney he was removing him from the news director job and offered him the sports director job. Kearney said he wouldn't accept the demotion, and he quit.

Kearney filed suit, alleging two elements of wrongful discharge: discharge without good cause and discharge in violation of the employer's written personnel policy. The case went to a jury trial. At its conclusion, the District Court judge directed a verdict against Kearney on the wrongful discharge claim alleging violation of personnel policy. The jury returned a verdict against Kearney on the claim that the discharge was not for good cause.

Kearney appealed the directed verdict. He hung his hat on this reasoning: KXLF had a policy of providing annual performance evaluations of all its employees. Kearney had not received an evaluation in 1987 or 1988. His boss had cited Kearney's performance deficiencies as the reason to demote him, yet Kearney had not been informed of the problems, nor had the opportunity to correct them. Thus, he had been constructively discharged in violation of KXLF's performance evaluation policy.

KXLF said it had no express written personnel policy on employee evaluations. KXLF's employee handbook contained no reference to evaluations. Kearney and his expert witness had inferred the policy from several sources. KXLF argued that if a "policy" had to be interpolated or inferred, then there really was no express policy giving rise to Kearney's claim.

The sources Kearney pointed to were preprinted evaluation forms and a memo from his boss's boss that everyone should receive a performance evaluation at least once a year. Kearney's boss testified that, yes, all employees were evaluated during 1987 and 1988, except for the employees he supervised, one of them being Kearney. He also testified that he had demoted Kearney due to concerns about his performance, but

he hadn't warned Kearney about his concerns nor documented them.

The Court concluded that "conflicting inferences could be drawn from this evidence and that reasonable persons could conclude that KXLF had an established and express policy of performing annual evaluations which it violated with respect to Kearney." The Court did not decide that a policy existed, but said that "Kearney was entitled to have the jury determine whether he met the threshold requirement of showing that KXLF's personnel policy expressly required annual evaluations ..." The Court remanded on this issue.

KXLF appealed another issue under the Wrongful Discharge from Employment Act . KXLF had sought attorney fees from Kearney based on his rejection of an offer to arbitrate the wrongful discharge claim. District Court had refused the request under the precedent of *Hoffman v. Town Pump* (see page 90). KXLF argued that the 1993 legislature had amended the Wrongful Discharge from Employment Act, overturning *Hoffman*. The Supreme Court ruled, "The amendments which were enacted in 1993 do not apply to the present case," and concluded that the District Court "properly refused to award KXLF attorney fees ..."

Baldridge v. Trustees, Rosebud County School District No. 19 and Keenan (1994) — ***due process, good cause*** *264 Mont. 199, 870 P.2d 711*

As another case involving termination of a teacher's contract for cause, this case covers all the levels of review common to such cases. The Supreme Court reaffirmed its stance taken in *Carbon County v. Spivey* (see page 101), and interestingly, made a plea for the legislature to take a look at the whole process of reviewing teacher terminations. This case resulted in a second appeal (see page 134).

Elmer Baldridge taught at Rosebud County High School in Colstrip. One classroom incident on March 30, 1988, set the events in motion that led to his termination. Allegedly, Baldridge put on a rubber glove in chemistry class, held his hand up, and asked, "Any female volunteers from the audience?" The incident led to complaints from parents and an investigation by the district superintendent. The superintendent listed the "glove incident" and 11 other incidents when he recommended that the school board terminate Baldridge's contract. The board held a hearing for Baldridge, then voted to dismiss him.

Baldridge appealed to the county superintendent of schools. After a convoluted set of hearings that involved one appeal to the state superintendent of public instruction, the county superintendent ruled that Baldridge be reinstated with pay. This ruling was based on errors in due process by the school board and on the fact that all the incidents except the glove incident were hearsay unsubstantiated by documentation in Baldridge's personnel file.

The board appealed to the state superintendent, who determined that the county superintendent had not adequately considered all the evidence. The state superintendent sent the matter back to the county superintendent and ordered reconsideration of her ruling. The county superintendent issued another ruling, closely resembling the first ruling and reaching the same conclusion: reinstate Baldridge. Again the board appealed to the state superintendent, who reversed the county superintendent's order, saying she had abused her discretion by reversing the school board's decision without adequate support for her decision.

Baldridge appealed the state superintendent's decision to District Court. District Court affirmed the decision, and Baldridge appealed to the Supreme Court. Upon review, the Court found errors all along the way. First, the county superintendent erred by issuing a flawed opinion: her findings were "no more than conclusory statements," and her conclusions were not "supported by authority or reasoned opinion." After the county superintendent's reconsideration ordered by the state superintendent, the second opinion came out "no better than the first."

Second, the Court found that the state superintendent erred in substituting her judgment for the county superintendent's. Basically, the county superintendent's decision was "so deficient," that the state superintendent should have again sent it back for reconsideration. Third, the District Court erred in affirming

the state superintendent's decision: the court "did not properly review Keenan's [state superintendent] decision because it did not base its review on whether the county superintendent's findings of fact and conclusions of law were supported by reliable, probative and substantial evidence in the first instance."

"Accordingly," said the Court, "we remand this case to the District Court with instructions to remand the case to the State Superintendent. The State Superintendent then must remand the case to the County Superintendent with instructions that she must carefully consider this case and draft findings of fact, conclusions of law and an order as mandated in § 2-4-623, MCA, and Rule 10.6.119, ARM."

The majority opinion closed with "an observation": "this case serves as a perfect example of why that procedure [appeal procedure between teachers and school districts] should be the subject of future, careful legislative scrutiny. The present process ... is technical, cumbersome, time-consuming, costly, frustrating and inefficient."

Justice Trieweiler dissented in part. He agreed that the state superintendent "exceeded her scope of review," and that the District Court erred in affirming her decision. He disagreed that the case should be sent all the way back to the county superintendent. He concluded that the county superintendent's findings and conclusions "were sufficient to explain her conclusion that ... Baldridge should be reinstated ..."

Trieweiler noted the majority's criticism of the "technical adequacy" of the county superintendent's opinions. However, "the hearing process before a county superintendent was never intended to be the equivalent of a trial before a District Court. Neither should county superintendents ... be held to the same standards of draftsmanship that we expect from district judges." Trieweiler would have remanded the case to District Court with an order to affirm the county superintendent's decision.

Guertin v. Moody's Market, Inc. (1994) — ***WDEA, good cause, procedure*** *265 Mont. 61, 874 P.2d 710*

In this appeal of a jury verdict favoring the plaintiff, the Supreme Court discussed testimony on "good faith and fair dealing" and dealt with the issue of good cause for termination.

Audrey Jean Guertin worked at Moody's store, Super 1 Foods, in Polson from January 1988 to October 1991. She managed the bakery and deli department. Apparently, she managed it well, receiving positive reviews and raises throughout her employment. She increased the sales of her department consistently, and started a successful, sideline catering business for the store.

One day, on her day off, Guertin was called in to help conduct an inventory in her department. When she got there, she found the managers had piled up a bunch of food that was out of code (beyond the date stamped on it). After the inventory, the managers sent Guertin home, then called her back 20 minutes later to tell her she was suspended for two weeks. Ten days later, Guertin called to ask if she could come in and talk about the suspension. At that time, she was told she was fired.

It was disputed as to when Guertin received, in writing, the reasons for her termination. The reasons given were related to sanitation, cleanliness, and inventory in Guertin's department. However, testimony given during the wrongful discharge trial rebutted these allegations. In fact, the store manager said he "never had occasion to inform Guertin that she had a dirty or unkempt department." And he had never noticed any inventory problems in the department.

Guertin prevailed in the jury trial, and Moody's appealed. It argued that trial testimony on good faith and fair dealing was precluded by the Wrongful Discharge from Employment Act. Guertin countered that Moody's had raised no specific objection to the testimony at trial. Further, she did not base her claim on the covenant of good faith and fair dealing; she framed it as a discharge without good cause, an element of wrongful discharge under the Act.

The Court agreed that "[n]owhere in the transcript is there a specific objection that any testimony was improper because it related to the covenant of good faith and fair dealing." Moody's advanced the "plain error" doctrine: the testimony affected their "substantial rights" and should be disallowed, even in the absence of an objection. The Court pointed out that "the 'plain error' doctrine is only to be used in exceptional circumstances. Moreover, a narrow view of the term 'substantial rights' is favored."

The Court concluded, "We cannot say that substantial rights of [Moody's] have been affected." Guertin's case and District Court's instructions to jury were not based on the covenant of good faith and fair dealing. "Moody cannot complain that the District Court erred in allowing evidence relating to good faith and fair dealing when it did not make a specific and timely objection on the record," said the Court, "... and this case does not warrant invoking the [plain error] doctrine where Guertin did not plead or argue and the court did not instruct on the covenant."

A second issue raised by Moody's related to good cause. At trial, District Court had denied a motion by Moody's for a directed verdict in their favor; Moody's claimed Guertin had failed to demonstrate the employer didn't have good cause for her dismissal. The Court disagreed: "Our review of the record convinces us that there [was] evidence to warrant submission of the wrongful discharge claim to the jury." Guertin presented plenty of evidence in support of her good performance and loyalty. She also noted that, when her son was fired from the store for theft, she began to receive a "cold shoulder" from management. "This evidence," said the Court, "counters the evidence presented by Moody's to support their contention that they terminated Guertin for good cause." Thus, it remained to the jury to decide the issue — a directed verdict would have been improper.

An interesting side note: the definition of "good cause" in the Wrongful Discharge from Employment Act refers to "failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." In *Buck v. Billings Montana Chevrolet* (see page 70), the Court isolated the term "legitimate business reason" and defined it as "a reason that is neither false, whimsical, arbitrary or capricious, ... [with] some logical relationship to the needs of the business." In Guertin's case, several of the Court's comments seem to take that language and apply it more broadly to "good cause" itself: "The evidence [Guertin] presented related to her burden to prove that Moody's reasons for firing her were false, whimsical, arbitrary or capricious, and not for good cause."

Two other issues were decided in the appeal. First, District Court had not allowed Moody's to call a specific witness at trial. The witness had been listed on Guertin's pre-trial list, but had been deleted from the list without objection from Moody's. They therefore lost the right to call that witness. Second, Moody's argued that the jury arrived at a "quotient verdict." This takes place when the jury members each state a damage award, the figures are added up and divided by the number of jurors to arrive at an average, or quotient.

A quotient verdict is grounds for a new trial. To be found, it requires two elements: the jurors must agree beforehand to be bound by its results, and it must be carried into effect. Here, the affidavits of nine jurors rebutted the affidavit of one juror that they had arrived at a quotient verdict. The Court found that "substantial evidence exists ... that the jury was not bound to a quotient verdict." Guertin prevailed on all the issues on appeal.

Koepplin v. Zortman Mining, Inc. (1994) — ***WDEA, privacy*** *267 Mont. 53, 881 P.2d 1306*

The employee in this case claimed not only wrongful discharge, but also invasion of privacy, based on a sheriff "frisking" him on the employer's premises. The Supreme Court affirmed summary judgment in favor of the employer.

Ronald Koepplin worked as a haul truck driver at the Zortman Mine from October 1991 to February 1993. Problems began to surface in January 1993, when co-workers told management Koepplin was verbally abusive and intimidating. In mid-February, a female worker complained that Koepplin had sexually ha-

rassed her. Management undertook an immediate investigation and determined that sexual harassment was just a part of Koepplin's conduct problems.

The managers called Koepplin in for a meeting, where they confronted him with the allegations. He denied them. The managers suspended him, pending further investigation. They scheduled a meeting with him to take place two days later. They also gave him specific orders not to threaten or intimidate anyone involved in the investigation. That same evening, Koepplin called the four managers involved. Each of the managers felt threatened by what Koepplin said.

Further investigation by managers uncovered a pattern of Koepplin's intimidating and threatening behavior at the worksite. The managers decided to dismiss Koepplin at the prearranged meeting. They also asked the sheriff to be present, as a precaution against violence. When Koepplin arrived for the meeting, the sheriff frisked him. The meeting then proceeded, and Koepplin was fired.

Koepplin filed suit for wrongful discharge and invasion of privacy. District Court granted summary judgment to Zortman Mining, and Koepplin appealed. The Supreme Court considered both claims.

On the wrongful discharge claim, the Court framed the issue as to "whether Koepplin was properly terminated for disruption of the employer's operation or other legitimate business reason." The Court focused on the threatening phone calls and dispensed with Koepplin's argument that he was making use of the firm's "open door" policy: "An employer's 'open door' policy does not exist for the purpose of allowing employees to threaten or otherwise intimidate management ..." The Court concluded that "Koepplin's threat ... was at least insubordination which justified immediate termination under Zortman's personnel policy. We further conclude that the District Court properly characterized this conduct as disruptive to the workplace and that Zortman had the right to serve its own legitimate business interest by discharging Koepplin ..."

Koepplin's invasion of privacy claim stemmed from the sheriff's actions at the termination meeting. Koepplin argued that Zortman's request for the sheriff to be present could not be separated from the sheriff's independent decision to search and frisk Koepplin. So Zortman was liable for this invasion of privacy. The Court disagreed: "We conclude there is no evidence Zortman participated in the decision to frisk and search Koepplin, nor has any agency relationship been established. Thus, there is no invasion of privacy proximately caused by Zortman's request for the sheriff 'to keep the peace.'"

Boreen v. Christensen, Youngblood, and Department of Military Affairs (1994) — ***due process, constructive discharge, § 1983*** *267 Mont. 405, 884 P.2d 761*

The Supreme Court ruled in this case that an administrative rule established a "property right" to employment for a state employee. In doing so, they distinguished the case from *Reiter v. Yellowstone County* (see page 6) and *Medicine Horse v. Big Horn County* (see page 78). Although the Court did not discuss *Welsh v. City of Great Falls* (see page 14), its decision in this case resembles that one. The Court reversed summary judgment and remanded the case.

Katharine Boreen worked for the Department of Military Affairs until she quit in April 1990. She filed suit in state court, stating claims under federal law 42 USC §§ 1983 and 1988. The basis of her claim was that she had a property right in her employment and had been constructively discharged without due process of law. District Court ruled she did not have a property right, and therefore could not state a valid claim under § 1983. Boreen appealed.

Boreen argued that the state's policy and administrative rule creates the property right. Specifically, the policy requires "just cause" for formal disciplinary action, including discharge. The Supreme Court viewed the question as an "issue of first impression — whether the 'just cause' provisions ... create a property interest in employment ..."

The Court reviewed a US Supreme Court decision, *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487. That decision held that an Ohio statute created a property interest for a classified school employee, and that the property interest mandated a "pretermination hearing" before discharge from employment. Clear distinction was made that, under *Board of Regents v. Roth* (1972) 408 U.S. 564, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ..."

Turning to the Montana cases of *Reiter* and *Medicine Horse*, the state Supreme Court emphasized that neither case included "existing rules or understandings" that gave rise to a property interest. However, the Court noted, "our decision in *Medicine Horse* specifically left for future resolution the case where, unlike Medicine Horse, a plaintiff did present '... [a] state law, or regulation specifically stating or otherwise indicating that he had a property interest in his position ...'" Well, said the Court, "[w]e are, here, faced with that case ..."

> "What is at issue here are the administrative regulations of the Department of Military Affairs — the State of Montana — which mandate that disciplinary action against its employees, including discharge, be taken only for 'just cause,' as defined ... We conclude that the regulations at issue here support Boreen's argument that she had a property interest in her continued employment. We further conclude that these regulations do provide Boreen with a specified term of employment. Under the regulations, Boreen was entitled to remain in her position of employment until there was 'just cause' for her termination. While Boreen's term of employment may not have been expressed in days, months or years, it was, nevertheless, expressed in relation to a definite period of time during which Boreen could reasonably expect her employment to continue — i.e., until her employer established one of the defined 'just cause' reasons why her employment should end."

The Court emphasized that its conclusion "does not nullify the at will statute. We simply conclude that Boreen is not an at will employee ..." The Court made another important distinction. The District Court ruling in *Boreen* and a recent federal District Court ruling both held that, under *Medicine Horse*, the Wrongful Discharge from Employment Act did not create a property interest in employment. Not quite so, said the Court: "while we stated in *Medicine Horse* that the [Act] had not nullified the at will statute, we did not address in that case, nor do we here, the question of whether the 'good cause' provision of the [Act], in and of itself, creates a property interest in continued employment."

Finally, this case included friend-of -the-court interventions by local government groups. They expressed concerns that the finding of a property interest would have "significant impact on local government operations." The Court responded to these concerns by "emphasiz[ing] the obvious":

> "First, our decision in this case pertains only to those employees who, like Boreen, can point to some written contract, state law, or regulation which states or otherwise provides a specified term of employment and, hence, a property interest in continued employment.
>
> "Second, nothing in this decision provides a public employee ... with life-time job tenure and immunity from discharge. Our decision here confers ... nothing more than what the regulations applicable to the employment at issue already provide.
>
> "Third, we have determined that regulations such as those at issue here create a property right to continued employment, absent the employer's demonstration of just cause. As a consequence, *Loudermill* mandates that due process requires notice to the employee with an explanation of the employer's evidence and the opportunity for the employee to respond in 'something less' than a full evidentiary hearing *before* termination. Such requirements, ... do not impose an intolerable administrative burden upon the government when balanced against the catastrophic consequences to the employee of losing his or her job and very means of support."

Sullivan v. Sisters of Charity of Providence (1994) — ***WDEA, damages, discrimination***
268 Mont. 71, 885 P.2d 488

The nuns' order was defendant in this suit as owner and operator of Columbus Hospital in Great Falls. Gordon Sullivan began working there in 1982 as director of public relations. A year later, he hired an assistant, Laura James. Conflicts at work between the two led to a change in which James became director of public relations and Sullivan became director of marketing.

Sullivan injured his back in 1985 and 1986. He scheduled surgery for April 1987, but was told if he didn't return to work, his job would be in jeopardy. He postponed surgery and returned to work, only to receive a negative performance evaluation. Within four months, he had turned it around and received a superior rating in July 1987. His back then worsened, and he took a leave of absence starting in November 1987. In January 1988, he met with his supervisor, who told him there were questions about the legitimacy of his workers' compensation claim. Sullivan had surgery in February and obtained a release to return to work in April 1988. At that time, he learned his job had been eliminated. The hospital offered him a job as Laura James's assistant at less than half his previous salary. He declined.

Sullivan filed suit, claiming common-law wrongful discharge, statutory wrongful discharge, and discrimination. District Court separated the discrimination claim, disallowing a jury trial on that issue. The court also limited Sullivan's claims to the remedies allowed under the Wrongful Discharge from Employment Act and thus disallowed common-law remedies. Sullivan's wrongful discharge claim moved to trial.

During discovery, the hospital did not produce requested documents — an "anonymous file" and the "Laura James file" — relating to its decision to eliminate Sullivan's job. The trial proceeded anyway, and the jury awarded Sullivan $70,000 in damages. Columbus moved for a judgment notwithstanding the verdict, which the court denied. Sullivan moved for a new trial on damages alone, which the court granted. Columbus appealed.

While the appeal was pending, Sullivan received the "anonymous file." Its contents showed that his supervisor and Laura James had worked to consolidate James's and Sullivan's departments and to terminate Sullivan. On Sullivan's motions, the Supreme Court dismissed the appeal and District Court took over the case again. However, the original district judge recused himself.

The new district judge issued an order at the end of 1993. He sanctioned Columbus $5,000 for willfully withholding documents, and he ordered a new trial on damages for Sullivan. Both sides appealed specific issues in the decision.

First, argued Columbus, it was an error to order a new trial on damages alone. The Court disagreed: "District Courts are empowered to order a new trial on damages alone." After examining precedent and Sullivan's case, the Court concluded that District Court "did not substitute its judgment for the jurors' decision regarding damages. Rather, the court properly ordered a new trial on damages so the jury could hear all evidence relevant to damages." Such evidence was the documentation that Columbus turned over after the first trial. Columbus also contested the sanctions imposed for withholding the evidence. The Court upheld the sanctions, saying, "District Court did not abuse its discretion ..."

Sullivan appealed the "bifurcation" of his discrimination claim, arguing that he was entitled to a trial on that claim. The Court, however, noted that "there is no right to a jury trial of discrimination claims based on the Montana Human Rights Act." It was within the district judge's discretion to segregate the claim, and the Court found that wasn't an abuse of discretion.

Sullivan also argued that his damages should not have been limited to those allowed by the Wrongful Discharge from Employment Act. Because the "secret plan" to dismiss him was afoot in 1987, before the Act took effect, Sullivan claimed it was evidence of constructive discharge. The Court noted that "Sullivan in-

correctly interprets Montana's law of constructive discharge." Under the facts of the case, said the Court, "Sullivan was not informed that his position was eliminated until April 1988, and he was not forced to quit" until after the Act had taken effect. This conclusion applied the Act to his case and ruled out any claim that Columbus had breached the implied covenant of good faith and fair dealing.

Phillips v. City of Livingston (1994) — ***statute, policy, collective bargaining agreement***
268 Mont. 156, 885 P.2d 528

In this case, a city's termination policy ran afoul of state law. So, even though the city followed its policy, it lost the case.

Howard Phillips worked as a firefighter in Livingston for four years. In October 1993, he received notice of a termination hearing the next day on charges of stealing money from the union fund. Then city officials postponed the hearing another day to prepare discussion of two other theft allegations. Phillips objected to the short notice before the hearing, so he received a continuance for another week.

The hearing took place before the city manager, although Phillips's attorney objected that the process didn't follow state law. The manager overruled the objection, heard the case, and decided to fire Phillips. Phillips petitioned District Court to order him reinstated, but the court turned him down. Phillips appealed.

The Supreme Court described the City's policy "that the city manager shall hold a termination hearing prior to any discharge, and that only the city manager may discharge an employee." However, said the Court, state law on municipal firefighters requires "charges must be presented to the next meeting of the [city] council or commission and a hearing had thereon." (7-33-4124, MCA)

"Livingston attempted to supersede the statutory duty of the city council to hold a hearing before it decides to terminate a ... firefighter," said the Court. This violated state law at 7-1-114, MCA, which limits local government powers.

The City raised the argument that it had to follow its own procedures because they were also part of the collective bargaining agreement with the firefighters. The Court cited a couple relevant passages from the agreement: "The Union agrees to adopt the City of Livingston Policy and Procedures manuals where not in conflict with this Agreement." And under the discipline section, "The employer may suspend an employee with pay pending the final decision ... by the appropriate authority."

Given this language, said the Court, it wasn't necessary to decide whether a worker waived a statutory right to a certain hearing by entering into a collective bargaining agreement. No, said the Court, the agreement is consistent with the law: "The appropriate authority for administering discipline in this case was the city council ..." So, "Phillips's union did not adopt Livingston's policy and procedures manual where it deals with discipline and discharge of city employees." The Court reversed the District Court decision and remanded the case.

Martinell v. Montana Power Company (1994) — ***discrimination, constructive discharge***
268 Mont. 292, 886 P.2d 421

The Supreme Court upheld a District Court finding of disability discrimination and constructive discharge. The decision let stand an award of $467,364.

Bonnie Martinell worked at MPC's Colstrip plant as a chemical laboratory technician, hiring on in April 1981. Shortly after she started working for MPC, her doctor diagnosed endometriosis, a chronic reproductive disease. In 1983, MPC put laboratory staff on rotating shifts to cut overtime. Martinell's condition caused her to miss a lot of days, which jeopardized her job.

Her doctor wrote a letter recommending she work only day shifts in the lab; he explained how the change would help her endometriosis. MPC denied her request, even though a co-worker offered to trade shifts. Martinell took the request up the chain of command, presenting added medical information. Twice more, MPC denied her request. After a run-in with her boss over numerous sick days, Martinell resigned in September 1984. She later filed suit, alleging disability discrimination and constructive discharge. (The law at the time referred to "handicap," the term used in the Court's decision; this summary uses "disability.")

After District Court found in Martinell's favor, MPC appealed. The Supreme Court first looked at whether Martinell's endometriosis was a disability under the Human Rights Act. MPC argued that it wasn't, since surgical treatment (hysterectomy) could have corrected the problem. The Court reached two conclusions: 1) Martinell's condition was an infirmity, and 2) the condition substantially limited the major life activity of working.

Does that mean MPC had to provide a reasonable accommodation, such as changing work shifts? MPC said no, since the law before 1991 made no reference to reasonable accommodation. Martinell argued that precedent implied the duty of reasonable accommodation. The Court looked at federal developments and the prior decade of cases decided by the Human Rights Commission, finding solid recognition for reasonable accommodation. Even MPC's Affirmative Action Plan mentioned reasonable accommodation for a disabled person. So, held the Court, MPC had a duty to reasonably accommodate Martinell's disability.

Turning the question of constructive discharge, the Court said it was necessary to look at "the totality of the circumstances." In this case, those circumstances weighed against MPC. Providing a shift change wouldn't have been an "undue hardship"; the company had provided it for other employees. Transfer to another job wasn't feasible, as Martinell had applied for other MPC jobs and the company had turned her down. In the end, the Court agreed that MPC had constructively discharged Martinell.

On the final issue, the Court upheld the damages awarded to Martinell. MPC argued that she failed to mitigate her damages by looking for other work. The Court disagreed: "there is substantial evidence ... that Martinell exercised at least ordinary diligence in searching for employment ..." MPC said the award of "front pay" was speculative; the Court said it was reasonable. MPC said Martinell could have sought reinstatement; the Court found that untenable, given the antagonism between the parties and MPC's "do not rehire" note in Martinell's personnel file. The Court upheld the damages.

In Re Termination of Abbey v. City of Billings (1994) — ***statute, due process, procedure***
268 Mont. 354, 886 P.2d 922

This case involved a judicial review of the City of Billings's termination of a police officer. The Supreme Court affirmed the District Court's decision upholding the city's action.

In March 1992, Wayne Abbey was allegedly involved in severe damage to a police car assigned to him. The Police Department brought disciplinary action against Abbey, resulting in a hearing before the Billings City Police Commission. The Commission denied Abbey's pre-hearing motion to have the charges dismissed. After the hearing in September 1992, the Commission suspended Abbey for three weeks. The Acting Billings City Administrator modified the Commission's decision and terminated Abbey's employment.

Abbey appealed the action to District Court, which upheld the Commission and Administrator. Abbey then appealed to the Supreme Court.

The first issue on appeal was the Commission's denial of Abbey's pre-hearing motion to dismiss all charges. Abbey contended that certain documents submitted by the Police Department were prejudicial and violated due process. The Commission did examine the documents, but refused to accept them into evidence or to consider them in relation to Abbey's case. The Court held this was the proper procedure

and that the Commission provided Abbey his due process rights.

The second issue concerned the hearing testimony of four men. Two police officers gave expert testimony on "accident reconstruction." Two other city employees gave technical information and opinions regarding damage to the police car. Abbey contested the qualifications of all four to testify. The Court concluded that the police officers had the expertise and experience to qualify them as expert witnesses. The Court agreed with District Court that the opinion testimony of the other two men was improper. However, their opinions were "no more than repetitions of the much more detailed testimony of the police experts," so their inclusion in the hearing was "harmless error."

The third issue dealt with the Commission's denial of Abbey's motion for a "not proven" ruling. After the City had made its case, Abbey made the motion. The Commission determined there was enough evidence presented to require that the hearing proceed. The Court reviewed the hearing record and agreed that the Commission was correct in denying Abbey's motion.

The fourth issue concerned the sufficiency of evidence by which the Commission reached its decision. Abbey contended the whole of the evidence was hearsay and conjecture. The Court recounted the findings of the Commission and concluded "that the record contains substantial evidence that the City's charges against Abbey were correct ..."

Finally, the fifth issue addressed the Administrator's modification of the Commission's decision. Abbey argued that the Administrator acted beyond his authority in changing the disciplinary action from suspension to termination. The Court examined the statute in effect at the time of Abbey's termination, § 7-32-4160, MCA, that gives a "mayor" the authority to "modify or veto" the decision of a police commission. Section 7-32-4153 defines mayor as the chief executive of any city. The plain meaning of the statutes, the Court concluded, gave the Administrator the authority to modify the Commission's decision and fire Abbey.

*May v.First National Pawn Brokers, Ltd. (1994) — **WDEA, arbitration, damages***
269 Mont. 19, 887 P.2d 185

This is the first case in which the Supreme Court reviewed an action that underwent arbitration under the provisions of the Wrongful Discharge from Employment Act. The Act states at § 39-2-914(5), "The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act." Thus, the Court's analysis here reflects more on the Uniform Arbitration Act than on the Wrongful Discharge from Employment Act. However, the results indicate the Court's direction on arbitration awards under the Wrongful Discharge from Employment Act.

Phil and Betty May began working for First National Pawn (FNP) in April 1989. They moved from Laurel to Great Falls at that time to manage FNP's Great Falls store. They each worked from 5% of the store's gross revenues and succeeded in increasing those revenues over six-fold. In 1991, FNP reduced compensation to 3.4% of sales. In 1993, FNP further reduced compensation and made abusive remarks to the Mays. They quit and brought this action against FNP.

The Mays offered to arbitrate the dispute, and FNP accepted. The parties agreed on an arbitrator, retired judge Gordon Bennett, and District Court appointed him to the case. He held a hearing in January 1994. Bennett found in favor of the Mays and awarded each of them $132,432 in damages. District Court approved the award, denying a motion by FNP to vacate the award. FNP appealed.

The Supreme Court pointed out that the arbitration had been kosher under the Wrongful Discharge from Employment Act. It then turned to the Uniform Arbitration Act (MUAA) to analyze FNP's appeal. The Court noted right away that the "MUAA clearly does not authorize judicial review of arbitration awards on the merits of the controversy."

The MUAA specifies five grounds for a court to vacate an arbitration award. One of these grounds is "evident partiality" by the arbitrator, and FNP argued that the arbitrator here had been evidently partial. The Court found no connection between this case and the precedent cases FNP cited. Further, said the Court, "partiality which will suffice to vacate an arbitration award must be certain, definite and capable of demonstration; alleged partiality which is remote, uncertain, or speculative is insufficient."

In reviewing FNP's complaints about specific conduct by the arbitrator, the Court found "speculative and conclusive allegations of partiality ..." "FNP essentially seeks to have this Court review the merits of the controversy and the extent to to which the evidence supports the Arbitrator's decision," said the Court. "We are not free to do so under the MUAA."

FNP also contended that the arbitration award should be vacated, based on a "manifest disregard of the law." Manifest disregard is not among the five grounds for vacating an arbitration award under the MUAA, and the Court was unwilling to adopt it as a basis. It found FNP's legal analysis unconvincing and "refused to engraft such a basis [manifest disregard] onto a statute strictly limiting judicial review of arbitration awards."

The Mays, for their part, asked the Court to assess further damages against FNP for bringing an appeal that was "frivolous" and "totally without merit." The Court, however, said it was looking at the evident partiality argument for the first time, so "we cannot say that the law in Montana was clear on this issue prior to this case." And although FNP's arguments were "inartfully presented" and "verging on frivolous," the Court declined to assess "Rule 32 damages." The case later resulted in a second appeal (see page 115).

Galbreath v. Golden Sunlight Mines, Inc., Placer Dome U.S., Inc., and Compensation Adjusters (1995) — ***WDEA, evidence*** *270 Mont. 19, 890 P.2d 382*

This case revolved around the reason for discharge stated in a discharge letter, compared with testimony allowed in District Court trial on wrongful discharge.

Bruce Galbreath started working for Golden Sunlight Mines (GSM) in 1982 as an instrument technician. In May 1989, he injured and reinjured his left knee at work. He was placed on short-term disability leave, which paid his full salary. Under terms of the leave, GSM reserved the right to verify medical absences. During his absence, Galbreath worked full shifts at a restaurant he owned with his wife.

In August 1989, Galbreath had surgery on his knee. Two weeks later, he reported for work at GSM. In the meantime, GSM's workers' compensation carrier had recommended accepting liability for Galbreath's injury. When Galbreath reported for work, GSM's Maintenance Superintendent told him he couldn't return to work until he delivered unconditional work releases from his doctors and clinic. GSM also demanded certified letters from those sources, explaining why Galbreath had been absent from work for three months. GSM accepted none of the documentation Galbreath submitted. The company fired him for failing to provide adequate documentation of his absence.

Galbreath filed a lawsuit that went to trial. The jury returned a special verdict finding in GSM's favor. Galbreath appealed, and the Supreme Court considered one issue: Did the District Court err in allowing evidence that Galbreath was discharged for reasons other than the one set forth in the discharge letter?

In the discharge letter, GSM said Galbreath was being fired for not furnishing the required documentation. GSM's Maintenance Superintendent testified at trial that Galbreath was fired solely for the reason given in the letter. At trial, the district judge had ordered he would exclude expert testimony or opinion testimony about the on-the-job accident that led to Galbreath's injury and absence.

However, the court allowed speculative testimony suggesting the accident had been staged. The court al-

so allowed GSM to present evidence related to Galbreath's activities after the accident. Relying on its decision in *Swanson v. St. John's Lutheran Hospital* (see page 6), the Supreme Court said, "Any collateral reasons suggested by the evidence, other than the sole reason stated in the discharge letter, were irrelevant, and therefore, inadmissible." The Court reversed the jury verdict and remanded the case.

Justice Weber dissented, joined by Chief Justice Turnage. Weber said the majority mistakenly relied on *Swanson*. The distinction, he said, was that the *Swanson* decision was grounded on § 39-2-801, MCA. That statute requires an employer "upon demand by such discharged employee, to furnish ... in writing a full, succinct, and complete statement of the reason of his discharge ..." Such had been the case in *Swanson;* the employee demanded the written statement under the law.

In Galbreath's case, though, he had made no such demand, so in Weber's opinion, "I conclude that § 39-2-801 is not applicable in the present case, and as a result, *Swanson* is not authority for the conclusion reached in the majority opinion."

*Hollister v. Forsythe and Rosebud County (1995) — **WDEA, statute of limitations***
270 Mont. 91, 882 P.2d 1265

This case involves the statute of limitations under the Wrongful Discharge from Employment Act and another statute, called the "renewal statute" (27-2-407, MCA).

Marilyn Hollister worked in the office of county attorney John Forsythe until he terminated her employment January 7, 1991. In July 1991, she filed a § 1983 claim in federal District Court. A year later, the court dismissed her suit, telling her it belonged in state court. Instead, Hollister appealed to the Ninth Circuit Court of Appeals. In April 1994, the appeal court affirmed the federal District Court's decision.

In May 1994, Hollister filed her claims in state court. The district judge ruled that, since her dismissal was in January 1991, her suit was barred by the one-year statute of limitations for a wrongful discharge claim and the three-year statute of limitations for her tort claims. The judge also held that the renewal statute did not apply, since Hollister filed her claim more than one year after the federal District Court decision. Hollister appealed.

The Supreme Court ruled that the District Court was in error. The renewal statute allows a plaintiff a one-year period after "termination" of a claim to commence a new action on the same cause. So, said the Court, "[r]esolution of this appeal hinges on interpretation of the word 'termination.'" Relying on precedent dating back to 1906, the Court concluded: "We hold that, under Montana's renewal statute, ... use of the word 'termination' refers to the ultimate termination which occurs after final appellate action. Accordingly, the one-year period begins to run from the date that the time for appeal expires or, in the event of an appeal, from the date of the remittitur or judgment of the appellate court." The Court reversed the District Court's decision and remanded the case.

*May v. First National Pawn Brokers, Ltd. (1995) — **damages** 270 Mont. 132, 890 P.2d 386*

This second appeal of the Mays' case merely reflects their attempts to collect the damages that were affirmed in their first appeal (see page 113). First National Pawnbrokers (FNP) resisted execution of the damage award, and the Mays moved for a supplemental hearing on FNP's assets. Testimony at the hearing revealed that one of FNP's principals had formed another corporation, First Montana Pawn.

The Mays then moved to appoint a receiver for FNP to prevent transfer of its assets. District Court granted the motion, and FNP appealed. FNP argued that District Court abused its discretion by failing to notify FNP prior to the appointment of a receiver. The Supreme Court ruled, "The plain language of § 25-14-201, MCA, however, specifically provides that the District Court may appoint a receiver at any time after the order to attend and be examined has been served on the judgment debtor and may do so without further

notice to the judgment debtor." FNP had been ordered "to attend and be examined" at the supplemental hearing, so the district judge was correct in appointing the receiver without further notice to FNP.

Baxter v. Archie Cochrane Motors, Inc. (1995) — ***WDEA, procedure*** *271 Mont. 286, 895 P.2d 631*

At issue in this case was the doctrine of "cumulative error" in a trial. The Supreme Court refused to extend the doctrine beyond criminal cases into civil cases.

Roy Baxter worked at Archie Cochrane Motors in Billings for eight months. He was fired in January 1993 for "inability to correctly interact" with customers and coworkers. He filed a wrongful discharge action in August 1993, and in July 1994, a jury awarded him $120,000 in damages. The auto dealership moved for a new trial, and District Court granted it. Baxter appealed.

Cochrane had alleged seven errors occurred in the trial. District Court had refused to declare a mistrial when the errors were addressed one-by-one at the trial. However, the court concluded afterward that the cumulative effect of the errors merited a new trial. The Supreme Court agreed that, singly, none of the errors justified a new trial. The Court disagreed with District Court's decision on cumulative error. "To date, this Court has applied the doctrine of cumulative error exclusively in criminal cases. We decline to extend it to civil cases based on the facts of this case."

When granting the motion for a new trial, District Court had also noted that some of its own jury instructions had been in error. However, noted the Supreme Court, neither party had objected to the instructions during the trial, and Cochrane didn't mention them in its motion for a new trial. The Court further said, "While a District Court may grant a motion for a new trial for a reason not set forth in the motion, it may do so only after giving the parties notice and an opportunity to be heard on the matter." Here, the district judge had raised the issue himself, and neither party had notice nor opportunity to argue the issue. This, said the Supreme Court, "was a manifest abuse of discretion." The Court reversed the decision granting a new trial.

Redfern v. Montana Muffler and Wells (1995) — ***WDEA, statute of limitations*** *271 Mont. 333, 896 P.2d 455*

The statute of limitations in the Wrongful Discharge from Employment Act was at issue in this case. With its decision, the Supreme Court relied on and clarified *Allison v. Jumping Horse Ranch* (see page 90).

Martin Redfern worked for Montana Muffler in Anaconda. The shop terminated Redfern's employment on October 24, 1992. On October 26, he received his final paycheck, which included pay for five days of unused vacation time. Redfern filed a wrongful discharge lawsuit on October 29, 1993. Montana Muffler won summary judgment on the basis that Redfern's action exceeded the one-year statute of limitations under the Wrongful Discharge from Employment Act. Redfern appealed.

Redfern argued that his employment relationship did not completely end until October 30, 1992, by virtue of the five days vacation pay he received. This vacation pay kept him "on the payroll" for five days after his termination. Redfern relied on *Allison* as precedent, a reliance the Supreme Court called "misplaced." After reviewing the statute and *Allison,* the Court determined that neither of them supported Redfern's argument. He was discharged on October 24, 1992. Further, said the Court, "Redfern's argument that the five days' vacation pay kept him on Montana Muffler's payroll ... is totally without merit. The vacation pay was a fringe benefit ... which he had earned ... prior to the date of his discharge ..." The Court affirmed summary judgment for Montana Muffler.

Tyner v. Park County, Cieri, Hunt, and Lovely (1995) — WDEA, damages, § 1983
271 Mont. 355, 897 P.2d 202

At issue in this appeal were two trial results: a directed verdict in favor of the defendant on a § 1983 civil rights claim and a jury award of zero damages for wrongful discharge. The Supreme Court affirmed both.

George Tyner started working for the Park County Road Department in May 1990. During his two and a half years working for the county, his work record was excellent. On December 9, 1992, however, an incident occurred that cost Tyner his job. Although he and his supervisor disagreed on several details of the incident, it was undisputed that Tyner shoved his boss.

As a result of the encounter, Tyner and his boss met with the county commissioners for about 30 minutes. Each gave his version of events, then they went back to work. The commissioners then met with the county attorney to discuss the issue. Following that meeting, they decided to fire Tyner. He received oral notice of the discharge that day. He also requested — and got — a written notice of discharge.

Tyner filed suit, including a claim of wrongful discharge and a civil rights claim under § 1983, alleging violation of his right of free speech. After hearing Tyner's case-in-chief, District Court granted a directed verdict to Park County on the § 1983 claim. At the end of the trial, the jury found that Park County had wrongfully discharged Tyner, but awarded zero damages. Tyner appealed.

Tyner alleged that firing him for shoving his boss was only a pretext: he really had been fired for exercising his right of free speech. He cited two points: 1) he had run against incumbent James Hunt for a seat on the county commission, and his discharge took place about a month after the election. (Tyner lost the election.) 2) He had told another commissioner he thought construction on a new sewage treatment plant in Gardiner was substandard and that "someone was getting paid off."

Park County maintained that its only reason for firing Tyner was the shoving incident. The Supreme Court noted that Tyner would have to prove that his "free-speech" statements were the motivating factor in his discharge. He failed to do so: "Tyner presented no evidence to link his discharge to the statements he made."

Tyner also pressed the argument that, because the jury found the county had wrongfully discharged him, the reason for firing him — the shoving incident — was baseless. So there must have been some other motivation, namely, his statements. The Court disagreed: "The evidence presented at trial concerning Tyner's wrongful discharge claim focused on the procedure by which the commissioners fired Tyner, not their motivation." In fact, said the Court, "the motivating factor was clear." Tyner was fired for shoving his boss.

Tyner also appealed his damage award, since the jury had awarded him zilch. The Court referred to *Dawson v. Billings Gazette* (see page 21) as precedent — it's up to the jury to determine damages, even if zero. Here, said the Court, there was "evidence of mitigating factors to offset Tyner's damage claim." Tyner was out of a job only a few months, and eventually he ended up making more money than he had with the county. The Court affirmed the zero damages award.

Weinstein v. University of Montana, Denison, & Kindrick (1995) — contract, procedure
271 Mont. 435, 898 P.2d 101

This appeal is a review of partial summary judgment granted to the University in a contract case. The Supreme Court's decision focused on a technical analysis of a specific rule of civil procedure, rather than on the merits of the case.

Martin Weinstein was hired in May 1992 as Director of the University's Mansfield Center. In May 1993, he was told his employment would end in six weeks. His contract called for at least one year's notice before termination. Weinstein filed suit, claiming the University breached his contract and breached the implied

covenant of good faith and fair dealing. He also claimed that the president (Denison) and provost (Kindrick) tortiously interfered with his contractual relationship with the University.

The defendants sought partial summary judgment on three issues, one of them being the tortious interference claim. District Court granted partial summary judgment on all three issues. Weinstein then moved to have the court certify its action as a final judgment under Rule 54(b) of the Montana Rules of Civil Procedure. The court granted Weinstein's motion. This allowed Weinstein to appeal the partial summary judgment; the University cross-appealed the Rule 54(b) certification.

The Supreme Court focused its analysis on whether District Court had been correct in certifying the partial summary judgment as final under Rule 54(b). Without getting into the minutiae of the analysis, suffice it here to say the Court held that District Court had erred. Essentially, because Weinstein's claims all arose from the same set of facts, the District Court had partially adjudicated a single claim: "The District Court did not determine whether future developments in that court might moot the necessity of review of issues presently before this Court." The Court reversed the certification. In doing so, the Court held it could not consider Weinstein's appeal, since the case was still active in District Court.

Jarvenpaa v. Glacier Electric Cooperative, Inc. (1995) — ***WDEA, constructive discharge***
271 Mont. 477, 898 P.2d 690

Is forced early retirement a constructive discharge under the Wrongful Discharge from Employment Act? This question, in this case, split the Supreme Court four – three. The majority answered "yes."

Donald Jarvenpaa worked for Glacier Electric Cooperative for 30 years, starting in 1962. He worked his way up to Manager of Operations. In September 1992, his manager told him he would lose his job by the end of the year because of performance problems. Glacier offered Jarvenpaa an alternative — accept a "Special Early Retirement Package" and avoid being fired. Jarvenpaa accepted. He also sued.

District Court granted summary judgment to Glacier. The court held that Jarvenpaa's retirement wasn't a discharge, since he had signed a statement that his retirement was voluntary and had accepted the benefits. Furthermore, the court concluded the "retire or be fired" choice was not a constructive discharge under the Wrongful Discharge from Employment Act. Jarvenpaa appealed.

The Supreme Court recognized it was facing, for the first time, the question whether accepting early retirement in lieu of being fired is a discharge. The Court looked to age discrimination cases for guidance, since those suits have often dealt with early retirement scenarios. Its review led the Court to state that, in Jarvenpaa's case, "a reasonable jury could conclude that Jarvenpaa was in fact forced to retire and that his termination was not voluntary."

The Court emphasized "that we do *not* decide here whether Jarvenpaa will prevail on his wrongful discharge claim. We do not decide whether Glacier's actions to terminate him were wrongful. That is for the trier of fact to decide." The Court's decision was that Jarvenpaa's early retirement constituted a discharge. In so holding, the Court reversed summary judgment and remanded the case.

Justice Weber entered a lengthy dissent, joined by Chief Justice Turnage and a district judge sitting for Justice Leaphart. Weber agreed with District Court's summary judgment, pointing out that Jarvenpaa "was not compelled to retire in the form that he did and was free to remain employed until discharged, when he would receive substantial benefits, although less that he received by retiring, and seek compensation for the discharge in a lawsuit." Accordingly, Weber found "no basis to conclude there was something which could be called a constructive discharge."

The effect of the majority decision, said Weber, sets a precedent telling employers it's a mistake to offer early retirement; they should just fire employees without consideration to their years of service or other

positive factors. "The opinion has the effect of inviting extended litigation in connection with the various early retirement plans which have been recently used throughout Montana, and even by the State government itself."

*Farrington v. Buttrey Food and Drug Stores Company (1995) — **tort, interference with employment** 272 Mont. 140, 900 P.2d 277*

While not strictly a wrongful discharge issue, this case raised the question of whether a third party — a customer — might be liable for actions that resulted in an employee being fired. In a four – three split decision, the Supreme Court revived the issue from summary judgment.

Jeff Farrington worked for Pennington's, a wholesaler in Great Falls. One of the customers on his route was a Buttrey's store. In March 1991, he disposed of some potato chips at Buttrey's; three of the bags were not damaged or out-of-date, and Farrington failed to properly credit Buttrey for the merchandise. Buttrey revoked Farrington's privilege to serve its stores, but allowed him to continue as a customer. As a result, he lost his job with Pennington's.

Farrington got another job with a food brokerage company, Mancini & Groesbeck. His job was to check retail displays for proper stocking and set-up, and one of his customers was Buttrey. About a year after Buttrey's first revocation, it banned Farrington from entering its stores altogether. This resulted in him losing his job with Mancini & Groesbeck.

Farrington brought suit against Buttrey for tortious interference with his employment, both at Pennington's and at Mancini & Groesbeck. District Court granted summary judgment to Buttrey, and Farrington appealed.

The Supreme Court cited precedent in noting the requirements of setting forth a prima facie case of interference with contractual or business relations: 1) the acts were intentional and willful; 2) the acts were calculated to cause damage in business; 3) the acts were done with the purpose of causing damage, without right or justification; 4) actual damages and loss resulted. Applying these criteria to Farrington's case, the Court said that "a jury could conclude that Buttrey was not justified in banning Farrington from its stores, thus presenting an issue of material fact."

Specifically, the Court noted that the "potato chip incident" occurred more than a year before the total ban was imposed. And in the second job, Farrington had duties unrelated to the problem that occurred when he was working for Pennington's — he didn't have to remove old product or credit customers for old product. Thus, the Court held that whether Buttrey's total ban against Farrington was improper remained a question of fact, precluding summary judgment.

Chief Justice Turnage dissented tersely: "Buttrey undisputedly had the right to exclude Farrington, an admitted thief, from its stores." This "right" would contradict the third criterion (above) of the interference tort. Justices Weber and Gray joined Turnage in dissent.

*Fandrich and Fandrich v. Capital Ford (1995) — **WDEA, exemption, discrimination** 272 Mont. 425, 901 P.2d 112*

This case arose from allegations of sexual harassment. In its decision, the Court affirmed *Harrison v. Chance* (see page 63), while addressing a 1993 amendment to the Montana Human Rights Act. The Court held that the Act is the exclusive remedy for sexual harassment complaints.

Cathy and Ryan Fandrich worked at Capital Ford, she as a clerk and cashier, he as body shop lineman and manager. At the time, they were engaged. The dealership's service manager supervised both Cathy and Ryan. In March 1993, Cathy quit her job, allegedly due to sexual harassment by the service manager.

Ryan objected to the way the manager was treating Cathy. Allegedly, the objections resulted in the service manager demoting and harassing Ryan. Ryan quit his job in July 1993.

Within three week's of Ryan's discharge, the Fandriches filed suit against Capital. They did not file a complaint with the Human Rights Commission, the agency charged with enforcing the Human Rights Act. The lawsuit listed four counts: wrongful discharge with regard to Ryan's termination, violation of Cathy's personal rights, sexual harassment, and assault. District Court dismissed all counts on the basis that the Montana Human Rights Act provided the Fandriches' exclusive remedy. The Fandriches appealed.

The Supreme Court first took up Cathy's issue. Recognizing that three of the four counts in the lawsuit dealt with the service manager's conduct toward Cathy, the Court referred to *Harrison*, in that the foundation of her claims was sexual harassment. Fandrich tried to distinguish her case from *Harrison:* in *Harrison*, the employer sexually harassed an employee; in Cathy's case, a coworker sexually harassed her. *Harrison* and the Human Rights Act, said Cathy, were inapplicable to her case.

The Court, however, noted that the 1993 Legislature had amended the definition of "employer" in the Human Rights Act by adding "agent": "'Employer' means an employer ... or an agent of the employer ..." Recognizing that the legislature did not define "agent," the Court adopted "the ordinary meaning": "A servant or employee is an agent who is employed by a master or employer whose physical conduct is subject to control or right to control by the master or employer." Since the legislature didn't specify otherwise, said the Court, the word "agent" in the definition of employer must include employees. Given this amendment, concluded the Court, "the Montana Human Rights Act provides Cathy's exclusive remedy for [her supervisor's] alleged sexual harassment."

What about Ryan? He alleged he was constructively discharged for threatening to report the harassment Cathy was receiving. He claimed this violated the Wrongful Discharge from Employment Act. However, noted the Court, the Human Rights Act prohibits retaliation against an employee for opposing discrimination in the workplace. So in Ryan's case as well, "the Human Rights Act provides his exclusive remedy."

Howard v. Conlin Furniture No. 2, Inc. (1995) — ***WDEA, constructive discharge, good cause*** *272 Mont. 433, 901 P.2d 116*

Is it a demotion or a discharge? This case explored the question. The Supreme Court split four – three, with the majority holding that the plaintiff had been discharged from his position, even though the employer offered him a lesser position.

In September 1990, Dean Howard began working as manager of the Conlin store in Billings. By May 1992, his "potential for advancement" was rated as "outstanding." In late 1992, Conlin's president (who had hired and supervised Howard) hired a district manager, Robert Anderson, from Atlanta. Anderson started working for Conlin in January 1993 and became Howard's supervisor. Before Anderson left Atlanta, a colleague, Doug Sahr, apparently asked him to keep an eye out for available jobs in Montana.

Telephone records showed that Anderson called Sahr several times at home and at work in February and March 1993. Anderson also began documenting complaints about Howard's work. In May 1993, Anderson removed Howard and hired Sahr as manager of the Billings store. Anderson offered Howard a sales position at less than half his former salary, but Howard rejected it.

In Howard's subsequent lawsuit, District Court granted summary judgment to Conlin. The court agreed with Conlin's argument that Howard was not discharged, and that Conlin had legitimate business reasons for demoting him. At best, said the court, Howard had a weak argument for constructive discharge, but he offered no evidence of intolerable working conditions. Howard appealed.

Howard argued that District Court erroneously focused on the issue of constructive discharge. In fact, he contended, he was fired as store manager. Conlin countered that Howard was demoted, not fired. The

Supreme Court focused first on this "sub-issue." On the record was the statement made by Anderson to Job Service when Howard applied for unemployment benefits: "(1) Dean Howard was discharged from the position of store manager ... (2) At that time he was offered a sales position at Conlin's. That offer was declined ..." Given this evidence, the Court concluded, "This case involves absolute and final termination from a managerial position, followed by an offer of employment in a functionally different, and substantially inferior, position with the same employer."

To find otherwise, said the Court, would circumvent the Wrongful Discharge from Employment Act. At best, Howard's refusal of the sales job might affect his duty to mitigate damages.

The court then turned to a second sub-issue: whether the discharge was for good cause without any factual dispute that would preclude summary judgment. The only evaluation of Howard's work had rated his performance as above average in nearly all areas. Anderson had testified that he had given no thought to firing Howard as little as 10 weeks before the discharge. However, Anderson laid out eight events that he said demonstrated good cause to fire Howard. Howard rebutted each of Anderson's reasons as either within company policy or beyond his control. The Court said these claims and counterclaims raised a factual issue. As a result, the Court reversed summary judgment.

Justice Gray dissented; she was joined by Chief Justice Turnage. Gray wrote that the definition of discharge in the Wrongful Discharge from Employment Act uses the phrase "termination of employment." The plain meaning of termination is "ending," not demotion. The pivotal statements by Anderson to Job Service, said Gray, "do not ... speak to the legal issue of whether a demotion is a 'termination of employment' ..." Gray would rather have focused on the issue of constructive discharge.

Justice Weber also joined in Gray's dissent, but added a point of his own. The definition of good cause in the Wrongful Discharge from Employment Act includes "reasonable job-related grounds for dismissal." The use of the word "dismissal," wrote Weber, buttresses Gray's point that discharge must mean an absolute ending of employment.

Schaal v. Flathead Valley Community College (1995) — contract, covenant, due process
272 Mont. 433, 901 P.2d 541

This case addressed three areas related to wrongful and unlawful discharge: breach of contract, breach of the covenant of good faith and fair dealing, and violation of due process. The college prevailed; the Supreme Court upheld summary judgment in its favor.

Robert Schaal taught at Flathead Valley Community College (FVCC) for three school years, from the Fall of 1989 through the Spring of 1992. The first and last years were covered by one-year contracts, while the middle year was covered by an oral agreement. At the end of the third school year, FVCC's Board of Trustees voted not to renew Schaal's contract.

Schaal filed suit, stating four claims: breach of contract, wrongful discharge, breach of the covenant of good faith and fair dealing, and violation of due process. Prior to trial, FVCC succeeded in a motion to dismiss the wrongful discharge claim. At the end of Schaal's presentation in a bench trial, FVCC moved for summary judgment on the remaining claims. District Court granted it. Schaal appealed.

Schaal said FVCC breached his contract by failing to honor his grievance or to arbitrate the dispute. FVVC countered that Schaal didn't follow the grievance procedure properly. He didn't use the proper form in submitting the grievance. And he didn't press the President's adverse decision to the next level of review. Based on these facts, the Supreme Court affirmed summary judgment on the breach-of-contract claim.

On the issue of breach of the covenant of good faith and fair dealing, Schaal claimed that FVCC had failed to follow its own policies. He advanced two arguments to support his claim. First, FVCC was subject to

the policies of the Board of Regents. One such policy provides that employees who have worked three years must be given six months' written notice of intent not to renew their contracts. FVCC pointed out that the Board of Regents' policies apply only to the University System, and FVCC is not part of that system. Second, Schaal argued, FVCC's own policy provides permanent status after a six-month probationary period. FVCC countered that the probationary policy hadn't applied to Schaal; he was a contract employee, and his contract had no provision for renewal. The Court agreed with FVCC, concluding that Schaal had no justifiable expectation of continued employment.

Schaal claimed violation of due process on the basis of a property interest in his employment. Because FVCC had not given him the opportunity to respond prior to termination, it had violated due process. The property interest arose, he said, in the Board of Regent's policy on notice of nonrenewal and in FVCC's probationary policy. For the same reasons stated before, FVCC argued that the policies didn't apply to Schaal. District Court found — and the Supreme Court affirmed — that Schaal had no property interest in his job.

Pike v. Burlington Northern Railroad Co. (1995) — ***discrimination, preemption***
273 Mont. 390, 903 P.2d 1352

This appeal arose from District Court's determination that federal law preempted a lawsuit. The Supreme Court reversed the summary judgment.

Kathryn Pike worked as a carman for BN in Havre from May 1977 until August 1992. Her employment ended when BN closed its diesel shop in Havre. Four other male carmen were given options for future employment. However, BN told Pike she would not remain in a carman job. Pike filed suit, alleging sexual discrimination in violation of state and federal law.

District Court concluded that Pike's claims were subject to the Railway Labor Act (RLA). Under that Act, "major" and "minor" contract disputes were bound to arbitration in front of the National Railroad Adjustment Board. Given this preemption, the court said it had no subject matter jurisdiction over Pike's claims. Pike appealed.

The Supreme Court reviewed the case in light of federal case law and its own decision in *Foster v. Albertsons* (see page 84). The Court said the RLA mandated arbitration for disputes arising under collective bargaining agreement (the law of the shop). Pike's claim stemmed from statute (the law of the land), and thus could be classified neither as a "major" or "minor" dispute under the RLA. The Court held that "Pike's claim of sexual discrimination is independent of the collective bargaining agreement, and does not require interpretation of that agreement." Because of this, the RLA did not preempt Pike's state and federal claims of discrimination. The Court remanded the case to District Court.

Talley v. Flathead Valley Community College (1995) — ***free speech*** *273 Mont. 336, 903 P.2d 789*

This was the second appeal from a case that started in 1989. The first appeal came before the Supreme Court in 1993 (see page 99). This appeal resolved the one issue that had been remanded in the first appeal, namely the question whether Flathead Valley Community College (FVCC) had violated Talley's right of free speech. Here, the Supreme Court upheld summary judgment in FVCC's favor.

Early in Frank Talley's dispute with FVCC, the college had sent him a letter, saying it would consider him for rehire if he stopped saying he had a right to or expectations of continued employment. Talley claimed this condition violated his right of free speech. When the issue came before District Court on remand, the court granted summary judgment to FVCC. Talley appealed.

District Court had determined that Talley's speech was a matter of private concern, rather than public concern. As a matter of law, then, his statements didn't come under constitutional protection. The Supreme

Court agreed, saying "the record does not establish that FVCC's failure to rehire Talley was a matter of public debate or interest in the community at large. The record, however, does establish that Talley's primary motivation for his statements was his desire for more teaching contracts for himself."

Talley pointed to the Court's own statement in his first appeal: "We conclude that the only constitutional claim which has merit under the pleadings is the claim of the denial of free speech ..." Talley claimed this statement was a ruling on the merits of the claim. If it were, the claim would not have been eligible for summary judgment in District Court, but would have had to go to trial. The Court pointed out that, in the first appeal, the free speech claim had not been part of summary judgment. Thus, said the Court, it was merely pointing out that the claim was "still alive." "The language cited by Talley," said the Court, "was not a ruling on the merits of the free speech claim; it was merely dicta."

Justice Hunt dissented: "Our conclusion [in the first appeal] was a ruling on the merits of the free speech claim. I would reverse the summary judgment ... and allow the matter to go to trial."

Motarie v. Northern Montana Joint Refuse Disposal Dist. (1995) — ***WDEA, public policy***
274 Mont. 239, 907 P.2d 154

The Supreme Court here undertook a question of first impression: if an employee complains of a violation of public policy by the employer, but the employer suffers no enforcement action, is it wrongful to fire the employee for reporting the "nonviolation"? The Court said ... well, it could be.

Gary Motarie went to work for the disposal district (NMJRDD) in July 1992 as an attendant at a landfill roll-off site in Cut Bank. Motarie noted that the site had no shelter, bathroom facilities, or means of communication. NMJRDD did nothing to fix these conditions, and Motarie complained to the federal Occupational Health and Safety Administration (OSHA). OSHA wrote to NMJRDD, noting the complaint. OSHA took no action to investigate, but asked NMJRDD to investigate and correct any problems. Further, NMJRDD was to report back to OSHA within 30 days. NMJRDD didn't respond to OSHA, and OSHA did nothing further. In January 1993, NMJRDD fired Motarie before his probationary period ended.

In District Court, Motarie's lawsuit fell to summary judgment in favor of NMJRDD. The court said OSHA had made no official determination that NMJRDD had violated the law. Because Motarie's report to OSHA didn't result in a citation or investigation, reasoned the court, there was no violation of public policy. So Motarie couldn't claim he was fired in retaliation for reporting a violation if no violation occurred.

On appeal, the Supreme Court disagreed: "This retrospective reasoning is without merit." Under the Wrongful Discharge from Employment Act, one element of wrongful discharge is "retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy" (39-2-904(1), MCA). The Court looked at this section and its decision in *Krebs v. Ryan Oldsmobile* (see page 89). It concluded that "regardless of whether the employee's report actually results in a citation or investigation, the test is whether the employee made the report in good faith."

Here, said the Court, NMJRDD offered no evidence that Motarie's report was baseless. And District Court erred in holding that Motarie's claim of a retaliatory firing were "conclusory and speculative." In short, "Motarie ... raised a genuine issue of material fact regarding an essential element of the [Wrongful Discharge from Employment Act]; namely, whether his discharge was in retaliation for good faith reporting of what he reasonably perceived to be a violation of public policy." The Court reversed summary judgment and remanded the case.

The Court also pointed out an important distinction of § 39-2-904, MCA, in the Wrongful Discharge from Employment Act. NMJRDD fired Motarie while he was still on probationary status. This fact was undisputed. But the Court noted, "The statutory prohibition on termination in retaliation for the employee's refusal to violate public policy does not distinguish between probationary and non-probationary employees." So this protection of the law covers all employees.

Wadsworth v. State of Montana and Dept. of Revenue (1996) — ***WDEA, res judicata, public policy*** *275 Mont. 287, 911 P.2d 1165*

This decision culminated a long-lasting dispute between the Department of Revenue (DOR) and on of its property appraisers, Shannon Wadsworth. Was DOR wrong for firing Wadsworth because he refused to give up moonlighting in the real estate business? The Supreme Court affirmed a jury verdict that said "yes."

In 1981, DOR adopted a conflict-of-interest rule that said appraisers may not engage in independent fee appraisals, real estate sales, or brokerage activities while off duty. Wadsworth filed a grievance against the rule, calling it unfair. A grievance committee agreed with him, but the DOR Director reversed the committee. Wadsworth filed for judicial review in District Court. In 1986, the court ordered a new grievance hearing because a substantial part of the record of the first hearing was lost. The second committee recommended upholding the policy. A new DOR Director adopted the recommendation.

As a result, DOR denied Wadsworth's grievance and ordered him to divest himself of all independent real estate interests. DOR also succeeded in having Wadsworth's court action dismissed. He didn't appeal. In 1989, DOR suspended Wadsworth for nine days and again ordered him to get out of his private real estate business within 30 days. Wadsworth filed a new grievance; the hearing examiner upheld DOR's position. In early 1990, DOR fired Wadsworth for refusing to give up his outside business.

Wadsworth then filed a wrongful discharge suit against DOR. District Court dismissed the State's two motions for summary judgment, and the case went to a jury trial. The jury found in Wadsworth's favor and awarded him $85,000 in damages. DOR appealed.

The State first argued that the doctrine of *res judicata* should have barred Wadsworth's wrongful discharge suit. Because he didn't appeal the 1989 dismissal of his petition for judicial review, he should not have been allowed to relitigate the issue. The Court held that Wadsworth's wrongful discharge claim was "a distinct and separate proceeding," involving a different subject matter, different issues, and different capacities of the parties involved.

At the crux of Wadsworth's case was this argument: he had a fundamental right to pursue employment and the State infringed on the right without a compelling state interest. Article II, Section 3 of the Montana Constitution provides for "inalienable rights," among them the right of "pursuing life's basic necessities." Following that reasoning, the opportunity to pursue employment is necessary to pursue life's basic necessities.

The Court agreed: "[W]e hold that the opportunity to pursue employment, while not specifically enumerated as a fundamental constitutional right under Article II, section 3 ... is, notwithstanding, necessarily encompassed within it and is itself a fundamental right ..." While recognizing that, the Court noted that the provision doesn't grant a right or property interest in any particular job or employment.

Given this fundamental right, the Court said it must apply the "strict scrutiny" analysis to an infringement of the right. Strict scrutiny requires the government to show a compelling state interest for its action that interferes with the right. In this case, said the Court, the State failed to do so. The State adopted the conflict-of-interest rule to avoid the appearance of impropriety. Yet, there had been no complaints of impropriety, no appraisers have ever been accused of wrong-doing, and, indeed, DOR did not consistently enforce the policy.

How does all this relate to wrongful discharge? Well, § 39-2-904, MCA, of the Wrongful Discharge from Employment Act says, in part, "A discharge is wrongful only if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy." Wadsworth contended that

DOR fired him in retaliation for refusing to abide by a policy that contravened public policy. The "public policy" at issue was the constitutional right to pursue life's basic necessities. The Court agreed and affirmed the jury verdict and damages for Wadsworth.

*Hollister v. Forsythe and Rosebud County (1996) — **res judicata, § 1983** 277 Mont. 23, 918 P.2d 665*

This is the second appeal by Hollister to the Montana Supreme Court (see page 115). In this decision, the Court affirmed District Court's dismissal of Hollister's civil rights claim under 42 U.S.C. § 1983. At issue was *res judicata* — whether the claim had been decided in previous litigation.

Hollister argued that *res judicata* did not apply, as the issues were not the same as in her prior federal case. She said the federal courts had addressed only the threshold question of a property interest in her employment with the county. The courts had found she did not have a property interest and dismissed her case. While Hollister's case was on federal appeal, the Montana Court decided *Boreen v. Christensen* (see page 108), which recognized a property interest in state employment. Under this decision, said Hollister, the federal courts erred on the threshold question and did not address the merits of her claim. Her state claim asserted her civil right of due process, not whether she had a property interest. Thus, she argued, the subject matter differed, and *res judicata* did not apply.

Forsythe countered that Hollister's claim in state court was the same as in federal court. Further, he said, even if the federal courts erred in ruling that Hollister had no property interest, *res judicata* still applied. The Montana Court agreed: "... summary judgment is a decision on the merits because it is a conclusive determination of a legal issue presented by the facts of a case."

The Court recognized that, in *Boreen*, it had discussed the Ninth Circuit's decision in *Hollister*. The Court didn't agree with the Ninth Circuit's application of prior Montana case law. "Despite our disagreement ...," continued the Court, "we are in no position to change the Ninth Circuit's decision. ... Hollister is bound by the judgment, *right or wrong*, of the federal court in which she brought her claim." In conclusion, the Court held "that the federal court summary judgment was a final judgment on the merits and that *res judicata* bars Hollister's state court action under § 1983."

Justice Trieweiler dissented. He said that the "interests of fundamental fairness" should win out over a technical application of *res judicata* in this case. He went on to distinguish this case from the precedent cited by the majority. He also cited precedent from a 1981 federal court case in Montana that "the doctrine [of *res judicata*] must give way to the overriding concern of simple justice."

*Schultz v. Stillwater Mining Company (1996) — **WDEA, exemption** 277 Mont. 154, 920 P.2d 486*

At issue in this decision was whether plaintiff's claim was exempt from the Wrongful Discharge from Employment Act. The Court reversed summary judgment and remanded the case.

Chris Schultz worked for Stillwater Mining Company until March 1995, when he was fired for fighting with a co-worker on company property. Schultz had reported the fight to management, saying that he had not started the fight and was only defending himself. After his discharge, he filed a complaint with the Mine Safety and Health Administration. He claimed he had been fired in retaliation for reporting a safety concern, i.e. the fight. The agency determined that the discharge did not violate the Federal Mine Safety and Health Act because the fight was not the type of activity covered by the Act.

Schultz also filed a wrongful discharge suit in District Court. The court granted summary judgment to Stillwater based on § 39-2-912, MCA. This section of the Wrongful Discharge from Employment Act exempts any discharge "subject to any other state or federal statute that provides a procedure or remedy..."

Because Schultz had filed the federal administrative complaint — and lost — he couldn't pursue a state claim. Schultz appealed.

The Supreme Court reversed, saying "Schultz has not been provided a procedure or remedy for contesting his dispute." Because the federal agency said the activity that led to Schultz's discharge was not protected by the FMSHA, said the Court, "his discharge was *not* subject to the FMSHA." As a result, the exemption in § 39-2-912, MCA, did not apply.

Fenger v. Flathead County, Gipe, Stratton, and Watne (1996) — ***WDEA, good cause***
277 Mont. 507, 922 P.2d 1183

In this case, the Supreme Court upheld District Court's summary judgment in favor of the employee. The Court held that, as a matter of law, the plaintiff's performance established reasonable grounds for dismissal.

Darrin Fenger worked as a detention officer at the Flathead County Juvenile Detention Center from 1989 until his discharge in April 1995. In February 1995, Fenger and a coworker allowed visitors into a secure area of the center. A supervisor told them not to do that. Ten days later, the policy was reiterated at a staff meeting that Fenger attended. The two continued to allow visitors into secure areas. Eleven days after the meeting, the center director circulated a memo reinforcing the no-visitors policy and noting that violation could result in discipline, even termination. Less than two weeks later, Fenger and his colleague again allowed visitors in a secure area. As a result, the two received a pretermination meeting with the director; he fired them both.

Fenger appealed the dismissal to the County Commission. After a hearing, the commission upheld his dismissal. Fenger then filed a wrongful discharge claim in District Court. After reviewing the record, including the commission hearing, the court held that the undisputed acts by Fenger constituted good cause for termination. The court granted summary judgment to the county, and Fenger appealed.

Fenger argued that he was not aware of the no-visitor rule until the memo came around. The Supreme Court reviewed the record, in which Fenger clearly stated he was aware of the no-visitors policy from the first occurrence. "Fenger cannot create a genuine issue of material fact as to his knowledge of this policy prior to the circulated memo by contradicting his own testimony in his new affidavit." As a result, the Court held "that the violations of the county's policy by Fenger constitute, as a matter of law, reasonable, job-related grounds for dismissal."

Walker v. Montana Power Company (1996) — ***WDEA, constructive discharge*** *278 Mont. 344, 924 P.2d 1339*

Is a demotion a constructive discharge? Can a person claim discrimination and wrongful discharge at the same time? In response to the first question, the Court re-examined *Howard v. Conlin's Furniture* (see page 120) and said, in essence, "It depends." The Court did not address the second question.

Lawrence Walker started as a lineman with Montana Power (MPC) in 1969. In 1987, he moved up to foreman. Sometime in 1991, employees under his supervision complained to management about Walker's supervisory methods. Managers realigned Walker's duties a bit, but kept him on as a supervisor. More problems arose, including two accidents with company vehicles. In April 1992, MPC demoted him to lineman.

A week later, Walker went on medical leave. With various extensions, this leave lasted until the end of November 1992. Walker then received unpaid personal leave until March 1, 1993. When he didn't return to work on March 1, the company sent a letter telling him to return by March 3 or risk being deemed a voluntary resignation. Walker didn't return March 3, so MPC terminated his employment.

Walker filed a ten-count claim in District Court. The court reduced the counts to two: disability discrimination and wrongful discharge. The case went to trial and the jury found in MPC's favor, saying Walker was not disabled and had not been constructively discharged. Walker appealed.

Walker claimed a mental disability brought on by work-related stress. This disability, he claimed, limited his participation in the major life activity of work. His doctor testified that he had treated Walker for work-related stress but had released him to work in July 1992, seven months before his discharge. The Court found that the "record of Walker's depression and stress is limited, at best." The Court concluded "that the jury properly could have determined that the credible evidence weighed in favor of a finding that Walker did not have a mental impairment ..." Further, "Walker was not regarded as having a disability by MPC."

Second in the appeal, Walker argued that MPC failed to accommodate him be removing him from a hostile work environment. Thus, his termination was a constructive discharge. He pointed to isolated incidents that constituted "violence in the workplace." He also complained that his demotion would have placed him under the supervision of those whom he had supervised. MPC testified that they had offered other placements to Walker, away from the crew he had supervised. "The record contains ample evidence," said the Court, "that Walker's discharge ... was for good cause — i.e., his failure to report for work after the expiration of his eleven month long series of medical and personal leave."

What the Court did not address, as a matter of law, was Walker's simultaneous claims of discrimination and wrongful discharge. Section 39-2-912, MCA, of the Wrongful Discharge from Employment Act exempts any discharge "subject to any other state or federal statute that provides a procedure or remedy..." A discrimination claim related to disability is subject to either the Montana Human Rights Act of the federal Americans with Disabilities Act. This issue did not arise in either District Court or the Supreme Court.

Eadus v. Wheatland Memorial Hospital (1996) — WDEA, grievance procedure
279 Mont. 216, 926 P.2d 752

At issue in this appeal was the "grievance clause" of the Wrongful Discharge from Employment Act, § 39-2-911, MCA. The Supreme Court ruled that an employer must provide a written copy of its grievance procedure at the time of discharge in order to enjoy the protection of this section.

Adeline Eadus worked at Wheatland Memorial Hospital from 1975 until her dismissal in July 1994. She filed suit against the hospital in March 1995. Before the case could go to a scheduled jury trial, Wheatland raised the issue of the grievance clause. Eadus had not even initiated an internal grievance after her discharge, much less exhausted it. This fact, said the hospital, barred her claim. District Court held that Wheatland had "substantially complied" with the requirements of the law and granted summary judgment to the hospital. Eadus appealed.

The case went right to the wording of § 39-2-911, MCA. This section provides a one-year statute of limitations for wrongful discharge claims. It also requires an employee to exhaust the employer's grievance procedures before filing a lawsuit. Failing to do so gives the employer a defense. On the other hand, the law requires the employer to tell the employee about the available grievance procedure and provide a copy of them within seven days of the date of discharge. Failing to do so relieves the employee of the requirement to exhaust the procedures.

It was unquestioned here that Wheatland had a grievance procedure and Eadus did not use it. It was also undisputed that Eadus's supervisor told her about the grievance procedure when she fired her. However, the boss did not give Eadus a copy of the procedure at that time or within seven days of the discharge. "Therefore," said the Court, "it is clear that Wheatland did not meet the second requirement contained in § 39-2-911(3), MCA."

Wheatland argued that it had given Eadus a copy of the procedure in 1989. The hospital also relied on *Hoffman v. Town Pump* (see page 90), in which the Court ruled that the employee could not pursue court action without first using the grievance procedure. Although Hoffman had not received a copy of the procedure, he had filed suit the same day of his discharge, precluding the employer from its seven-day "grace period" to provide the copy. *Hoffman* doesn't apply here, said the Court, as the hospital had ample time to meet the requirements of the law. The Court reversed summary judgment and remanded the case.

Mysse v. Martens, Pinkerton, Bailey & Rosebud County (1996) — ***WDEA, good cause, due process, § 1983, discrimination*** *279 Mont. 253, 926 P.2d 765*

She didn't want to drive the bus. This stand by the employee led to a decision that clarified *Boreen v. Christensen* (see page 108), added to the interpretation of a "good cause" wrongful discharge complaint, and dealt with age discrimination.

Patricia Mysse worked 20 years for Rosebud County, coordinating and providing transportation for senior citizens under the County Council on Aging. She used her personal vehicle "on call" to transport people. Her job description required her to draw up a transportation schedule and publish it. She never did, although she advertised that transportation was available on request.

In 1990, the Board of County Commissioners used grant money to buy a 12-passenger bus for senior citizens. Mysse had objected to buying the bus, and after the county bought it, she kept using her own car without a set schedule. At a Board meeting in January 1992, the commissioners told Mysse that setting a schedule and driving the bus were conditions of her job. Mysse refused and threatened to quit. The commissioners asked her to think it over. They also sent a letter directing her to set a schedule and use the bus. When Mysse didn't respond within three days, as directed in the letter, the Board fired her for refusing to perform her job as directed.

Mysse grieved the action and received a hearing before the Board. She claimed her dismissal was illegal and demanded compensation. The Board upheld the firing. Mysse filed an age discrimination complaint with the Human Rights Commission and a District Court suit claiming deprivation of rights and wrongful discharge. After the Human Rights Commission dismissed her claim and gave her a right-to-sue letter, she amended her court action to include discrimination. District Court granted summary judgment to the County, holding that the County had fired Mysse for good cause — refusing to obey lawful directives of the Board. Mysse appealed.

The first of Mysse's claims was that the county had not provided due process, a violation of rights under 42 U.S.C. § 1983. Specifically, she said the County failed to hold a pretermination hearing, as laid out in *Boreen*. The Supreme Court found nothing in the record to show whether Mysse had a property interest in her job that entitled her to due process. Assuming she did, though, the Court found that she had received due process. The meeting with the Commission when they directed her to comply or risk losing her job served as a pretermination hearing. The Court noted that "the pre-termination hearing need not definitely resolve the propriety of the discharge. I should be an initial check against mistaken decisions ..." The meeting with the Board satisfied that requirement. Mysse's § 1983 claim did not stand.

The second of Mysse's claims was wrongful discharge: the county lacked good cause for firing her. Here, the Court most clearly stated the burden that it inferred in *Buck v. Billings Montana Chevrolet* (see page 70) and *Guertin v. Moody's Market* (see page 105): "In order for an employee to defeat a motion for summary judgment on the issue of good cause, this Court requires the employee to prove that the given reason for the discharge ... is a pretext and not the honest reason for the discharge."

Although Mysse argued that she was a "scapegoat" for the Board's unwise purchase of a bus, the Court found this "mere speculation." Mysse presented no evidence to show the reasons for her discharge were a

pretext. "Mysse's termination was the direct result of her refusal to drive the bus or create a transportation schedule. The Board terminated Mysse because she refused to satisfactorily perform her job duties." The Court affirmed summary judgment against Mysse's wrongful discharge claim.

The third of Mysse's claims was age discrimination. (She was 69 when she lost her job.) The Court outlined the conditions for a prima facie case of age discrimination: the person is 1) in the protected age group, 2) performing the job satisfactorily, 3) discharged, and 4) replaced by a substantially younger person. Here, the Court found that "Mysse failed to make out a prima facie case of age discrimination" because "she was not performing her job satisfactorily." The Court affirmed summary judgment on the age discrimination claim.

Finally, Mysse raised several tort claims, including breach of the covenant of good faith and fair dealing, emotional stress, harassment, humiliation, impairment of reputation, pain and suffering, and punitive damages. The County argued that these were not separate claims in her lawsuit and that she was raising them for the first time on appeal. The Court found that "Mysse's complaint did not adequately aver the tort claims of intentional infliction of emotional distress, tortious interference with employment, or any other tort claim." Because of this, she was barred from raising the claims on appeal.

Further, the only tort claim set out specifically was for breach of the covenant of good faith and fair dealing. However, § 39-2-913, MCA, of the Wrongful Discharge from Employment Act preempts any tort claims in a wrongful discharge case. Consequently, this tort claim was barred as well.

Clark v. Eagle Systems, Inc., Ackerman, Schweitzer, and Sundquist (1996) — ***WDEA, constructive discharge, tort, preemption*** *279 Mont. 279, 927 P.2d 995*

This decision follows along the lines of *Howard v. Conlin's Furniture* (see page 120) and *Walker v. Montana Power Co.* (see page 126). That is, does a demotion constitute a discharge? In this case, the employee accepted the demotion and kept working for several months. The Supreme Court held that there was no "discharge" under the Wrongful Discharge from Employment Act.

Art Clark went to work as terminal manager for Eagle Systems in May 1985. Apparently, his abusive management style led to a demotion in November 1991 to "utility person." He worked at that job until disabilities forced him to retire. In May 1992, Clark filed an age discrimination complaint, which moved from Human Rights Commission to federal District Court to state District Court. As amended, the suit alleged age discrimination, tortious interference with contract, and wrongful discharge. District Court granted summary judgment to Eagle Systems.

Using *Howard* as precedent, District Court had found Clark was discharged under the meaning of the Wrongful Discharge from Employment Act. However, the court also found the Eagle Systems had good cause to discharge Clark as terminal manager. The Supreme Court called this the right result for the wrong reason. Contrasted with *Howard*, the Court said this case differed: "In the instant case, there has been no termination. Unlike *Howard*, there has been no cessation of employment followed by an offer of an inferior position." Clark kept working; he did not allege constructive discharge, nor did he resign. With no discharge, the Wrongful Discharge from Employment Act would not apply, so summary judgment was the correct outcome.

Clark's age discrimination claim failed much the same way as that in *Mysse v. Martens* (see page 128). That is, he could not make a prima facie case because he was not satisfactorily performing his job as terminal manager. He presented no evidence that would contradict Eagle System's defense.

Finally, the Court took a look at Clark's claims of tortious interference and infliction of emotional distress. District Court had said these claims were preempted by the Wrongful Discharge from Employment Act. Since the Supreme Court held the Act didn't apply here, District Court's ruling was in error. Still, said the

Court, the outcome was correct: "... Clark was responsible for his own demotion; Clark has no claim against the individually named defendants ..." The Court affirmed summary judgment.

Justice Trieweiler dissented, joined by Justice Hunt. Trieweiler agreed with the age discrimination ruling, but disagreed with the "no discharge" holding on the first issue. "Clark was permanently terminated from his position as terminal manager ... He was then offered a totally different job ... as a utility person at substantially reduced pay." Trieweiler said, "This case is indistinguishable in any practical aspect from *Howard v. Conlin Furniture.*" As a result, the Court should have recognized his claim under the Wrongful Discharge from Employment Act.

Boreen v. Christensen, Youngblood, and Department of Military Affairs (1996) — ***§ 1983, due process, qualified immunity*** *280 Mont. 378, 930 P.2d 67*

A second appeal in this case (see page 108), this decision dealt with qualified immunity for defendant Youngblood. In a four – three decision, the Supreme Court held that qualified immunity applied.

In the first appeal, the Court had held that Katharine Boreen could proceed with her civil rights claim under 42 U.S.C. § 1983. The basis of the decision was that the State's rules granted Boreen a property interest in her job. If she was constructively discharged without due process, it could be a violation of her constitutional right to due process. Guy Youngblood had been a supervisor over Boreen's position. Under § 1983, a person in that position can be individually liable for a violation of rights.

Back in District Court, Youngblood moved for the protection of qualified immunity. Such immunity is available when the defendant may have violated the plaintiff's rights, but could not reasonably have known that such rights were clearly established. District Court granted the motion, and Boreen brought the issue to the Supreme Court.

The Court recognized the issue as a matter of federal law and turned to federal precedent to resolve it. "The qualified immunity inquiry focuses on whether a defendant, faced with circumstances similar to those of the defendant before the court and in light of the legal authorities extant at the time the defendant acted, reasonably should have known that his or her conduct was unlawful." This inquiry uses a "two-pronged test": 1) whether a clearly established right has been violated, and 2) whether a reasonable person would have known that his conduct violated that right.

Youngblood argued that Boreen's property interest in her employment was not clearly established at the time of her discharge in 1990. The U.S. Supreme Court on the issue, cited extensively in *Boreen I*, was *Cleveland Board of Education v. Loudermill* in 1985. However, the Montana Court said that *Loudermill* pointed to an examination of state law: "The *Loudermill* decision, therefore, did not answer the question of whether a public employee in Montana has a property interest in his or her employment."

In *Boreen I*, the Court recognized the property interest question as an issue of "first impression." Looking at prior Montana case law (see *Reiter*, page 6, and *Nye*, page 8), the Court concluded,

> "While pre-1990 case law did not hold specifically that an administrative 'just cause' provision did not create a property interest in employment, neither was it clear that the 'just cause' provision affirmatively established a property interest. Certainly, the 'contours' of an employee's right to a property interest in employment were not sufficiently clear such that a reasonable official would understand that he was violating that right. We therefore hold that at the time Boreen was constructively discharged in 1990, it was not clearly established that she had a protected property interest in her employment."

This holding defeated the first prong of the qualified immunity test, making the second prong moot. As a consequence, the Court held that Youngblood was immune from suit.

Judge Nelson dissented, joined by Justices Trieweiler and Hunt. Nelson wrote that the *Nye* and *Loudermill* cases clearly established Boreen's property interest and right to due process at least five years before her discharge. All the rest, according to Nelson, is mumbo-jumbo. Youngblood should have known he was violating Boreen's right of due process. He should not enjoy immunity.

Basta v. Crago, Inc., d/b/a Printing Center (1996) — ***WDEA, contract, covenant***
280 Mont. 408, 930 P.2d 78

Does a pre-employment memo containing a salary offer for the first two years of employment constitute a contract for a specified term? In this case, a four – three majority of the Supreme Court said no.

In December 1991, Craig Barber, owner of Crago, Inc., parent of the Printing Center, contacted Doc Basta about working for him. During negotiations, Barber sent Basta two letters and a memo. The memo laid out such things as medical insurance coverage, vacation time, and salary and bonus scales for the first and second years of employment. Basta went to work for Barber in March 1992. Economic conditions of the business skidded badly; in February 1993, Barber discharged Basta and another employee.

Basta initially filed a wrongful discharge suit, alleging discharge without good cause. Crago, the corporate defendant, responded that the discharge stemmed from financial stresses, a legitimate business reason constituting good cause for the discharge. Basta conceded this point but wrangled a ruling allowing him to file an amended complaint. The new complaint alleged 1) breach of contract and 2) breach of the covenant of good faith and fair dealing. Crago responded that no written contract existed, so Basta's claims were preempted by the Wrongful Discharge from Employment Act. District Court granted summary judgment to Crago, and Basta appealed.

The Supreme Court stated, "The issue raised on appeal is whether the parties entered into a written contract of employment for a specific term." If not, Basta's claims would be barred under § 39-2-912, MCA, of the Wrongful Discharge from Employment Act: "if either the contract is not in writing or it is not for a specified term, then the exemption does not apply ..."

The Court went with an assumption that Barber's memo to Basta constituted a written contract, but concluded it didn't specify a term of employment: "At best, the memorandum simply states Basta's proposed salary for the first two years of his employment. In fact, nothing in the memorandum sets out a specific term, whether for two years or more. The memorandum not only fails to specify a termination date; it does not even designate a hiring date." The Court also cited Basta's testimony; it showed that Basta thought the memo covered two years but that Barber was offering to employ him for at least five years. The Court held that there was no contract for specified term, so Basta's contract claims were barred by the Wrongful Discharge from Employment Act.

Justice Trieweiler, joined by Justices Hunt and Leaphart, dissented. "I conclude," wrote Trieweiler, "that the parties did enter into a written contract for a specific term ..." He reviewed contract law and the memo in question, concluding there was a written and executed contract providing for "a minimum term of two years of employment."

Pool v. Butte Pre-Release Center, Inc. (1997) — ***WDEA, procedure*** *283 Mont. 287,*
939 P.2d 1011

This case dragged on for nine years before District Court dismissed it. The grounds for dismissal was the plaintiff's failure to actively pursue the case. The Supreme Court upheld the dismissal.

Walter Pool filed a tort claim in 1987, alleging he had been wrongfully discharged in 1985. In 1990, District Court granted Pre-Release's motion to dismiss, based on "failure to prosecute." Pool got a new lawyer and convinced the court to set aside the dismissal. From June 1994 to November 1995, Pre-Release repeat-

edly tried, without success, to depose Pool. In April 1996, District Court again dismissed the case for failure to prosecute. Pool appealed.

The Supreme Court upheld the dismissal. "The record reflects that, even following the previous dismissal of his case for failure to prosecute, Pool did not make himself available to be deposed for over twenty-two months ..." This, combined with other factors, justified the dismissal under the Rules of Civil Procedure.

Moore and Moore v. Imperial Hotels Corporation (1997) — ***WDEA, arbitration, procedure*** *285 Mont. 188, 948 P.2d 211*

Can losing plaintiffs who appeal a verdict be required to post a bond to cover anticipated defense attorney costs? In this decision, the Supreme Court said no. The case resulted in a second appeal (see page 132).

Linda and Gary Moore, husband and wife, sued Imperial for wrongful discharge. Imperial offered to arbitrate the dispute under the Wrongful Discharge from Employment Act (§39-2-914, MCA), but the Moores refused. The case went to trial, resulting in a verdict in Imperial's favor. Another section of the Wrongful Discharge from Employment Act (§ 39-2-915, MCA) provides that a party whose offer to arbitrate is refused and yet prevails in court is entitled to attorney fees incurred from the date of the offer to arbitrate. Under this section, District Court ordered the Moores to pay Imperial $41,881.

The Moores filed notice of appeal, and Imperial asked District Court to order the Moores to post a $5,000 bond to cover the anticipated costs of defending the appeal. District Court granted the order. The Moores appealed.

The issue involved the provisions of the Wrongful Discharge from Employment Act and two Rules of Appellate Procedure — Rule 6 and Rule 33. Rule 6 allows District Court to require appellant to file a bond to cover "costs on appeal," without defining such costs. Rule 33 provides for costs on appeal to include 1) printing briefs and appendices and 2) preparing and transmitting the record. Imperial argued that state law provides for costs allowed by rule or "by express provision of law." Imperial pointed to § 39-2-915 as an express provision of law that allows attorney fees to be part of costs on appeal to be covered by a bond.

The Supreme Court sided with the Moores. Imperial was only anticipating attorney fees for defending the appeal; § 39-2-915 allows recovery of costs incurred. Said the Court, "This estimate of costs cannot be yet be included as costs on appeal as 'reasonable attorney fees *incurred* ... because they are not costs that have actually been *incurred* by Imperial." [emphasis in original]

The Court held that District Court abused its discretion in ordering the Moores to post the bond. However, the Court made it clear that it was not precluding Imperial from recovering attorney fees incurred in the appeal "if they are ultimately successful in the litigation."

MacMillan v. State Compensation Insurance Fund, et al. (1997) — ***WDEA, cause of action*** *285 Mont. 202, 947 P.2d 75*

Does statutory language that a public employee "serves at the pleasure of" a public official preclude a wrongful discharge action? In this instance, involving Montana's State Fund, the answer is no.

State Fund is an independent public corporation created by the 1989 Legislature to provide workers' compensation insurance. That same year, the Fund's executive director hired Don MacMillan to serve as vice-president of the benefits department. A new executive director took over the State Fund in 1993 and subsequently discharged MacMillan in April 1994.

MacMillan filed suit under the Wrongful Discharge from Employment Act (WDEA) and the federal 1872 Civil Rights Act (42 U.S.C § 1983). State Fund moved for and received summary judgment on the grounds

that MacMillan didn't have a cause of action under either law. MacMillan appealed the portion of summary judgment that said he couldn't bring a case under the WDEA.

The Supreme Court reviewed the WDEA, including its exemptions under § 39-2-912, MCA. "It is undisputed," said the Court, "that the exemptions do not apply in this case and, therefore, that nothing in the WDEA itself precludes MacMillan from bringing a wrongful discharge claim against the State Fund under the WDEA." However, said State Fund, the laws creating State Fund provide that its management staff "serves at the pleasure of the executive director" (§ 39-71-2317, MCA). State Fund argued that this law created a new exemption from the WDEA, thus precluding MacMillan's claim.

The Court disagreed, saying that nothing in the phrase "'serves at the pleasure of the executive director' states or otherwise suggests in any way that the management staff of the State Fund are exempt from ... the WDEA." Well, said State Fund, the Governor gets to do it. Perhaps, said the Court, but the laws covering the Governor's powers include specific clauses that allow the Governor to remove directors or to terminate without cause. The State Fund statute has no such clause.

State Fund argued further that its laws exempt its employees from certain provisions of state personnel policy. True, said the Court, but those policies "do not related to the question of whether a particular state employee has a right to bring an action under the WDEA ..." If anything, said the Court, "the exemption from certain personnel policies ... reflects that the legislature is well aware of how to create exemptions to, or exceptions from, the applicability of other statutes." Had the Legislature wanted to, it could have expressly exempted State Fund managers from the WDEA. But it didn't. As a result, District Court's summary judgment in favor of State Fund was in error.

Kulm v. Montana State University-Bozeman & Charron (1997) — WDEA, tort, ***preemption*** *285 Mont. 328, 948 P.2d 243*

The plaintiff tried to liken his case *Beasley v. Semitool* (see page 97) to protect his tort claims against the University. The Supreme Court didn't agree with his argument.

Gerald Kulm had been professor of mathematics at Texas A&M when he applied to Montana State University-Bozeman (MSU) as an evaluator in the Step Project, a federally funded math and science curriculum project. He got the job and moved his family to Bozeman, starting work in March 1994. There was no written contract between him and MSU. About six months later, the co-directors of the Step Project told Kulm this they wouldn't renew his contract past April 1995. They didn't point to any performance problems, but said the granting agency might not fund two evaluators on the project.

In May 1995, Kulm filed suit alleging fraud, negligent misrepresentation, and breach of the implied duty of good faith and fair dealing. He based these claims on the circumstances of his hiring, saying the university had induced him to leave Texas A&M, said the job would last at least four years, and asked for a minimum two-year commitment from Kulm. MSU moved for summary judgment, saying Kulm's tort claims were preempted by the Wrongful Discharge from Employment Act. District Court granted the motion, and Kulm appealed.

Section 39-2-913, MCA, provides that "... no claim for discharge may arise from tort or express or implied contract." Kulm argued that his claims were not "claims for discharge," saying they arose several months before his dismissal. He compared his situation to *Beasley*, where the Court distinguished plaintiff's contract claims from his termination. District Court had cited *Dagel v. City of Great Falls* (see page 76) as the applicable precedent: "Kulm, like Dagel, would have no conceivable cause of action if he were still employed." The Supreme Court agreed: "Kulm's claims are inextricably intertwined with and based upon his termination from employment." So, his tort and contract claims were preempted by the Wrongful Discharge from Employment Act.

Baldridge v. Trustees, Rosebud County School District No. 19 and Keenan (1997) — ***due process, good cause, statute*** *287 Mont. 53, 951 P.2d 1343*

The first time this case reached the Supreme Court (see page 105), the Court remanded it all the way back to the County Superintendent of Schools. The case then worked its way back to the Supreme Court, which affirmed Baldridge's 1988 dismissal in a five – two decision.

Upon remand, the County Superintendent entered extensive conclusions of law. She reversed Elmer Baldridge's dismissal, saying the school board had failed to establish the teacher was incompetent or unfit to teach. Thus, the board lacked good cause to terminate him. The Board appealed to the State Superintendent of Public Instruction. She reversed the County Superintendent's decision, concluding that the County Superintendent had erred as a matter of law in holding that the Board lacked good cause. Baldridge petitioned District Court for judicial review. The court affirmed the State Superintendent's decision. Baldridge appealed to the Supreme Court.

The Court declared that the only issue was "whether the County Superintendent correctly applied the law to the undisputed facts." The County Superintendent had held that the facts did not demonstrate Baldridge's "unfitness" to teach, as set forth in § 20-4-207, MCA. The Court noted that the statutes fail to define unfitness. However, precedent shows that "a teacher may be unfit to teach if he or she engages in inappropriate conduct in the classroom or with students outside the classroom."

The Court reviewed the record of incidents alleged against Baldridge and concluded, "Each of the seven incidents is inappropriate conduct by a high school teacher toward his students." It wasn't a matter of the severity of any one incident, but the combined effect: "A teacher who makes jokes about testes and student's menstrual periods, flips off his students ..., and makes gender-based remarks and innuendoes in his classroom is unfit to continue teaching as a matter of law."

The Court allowed that the evidence supported the County Superintendent's conclusions that Baldridge did not intend to offend his students and that, in general, the students were not offended. However, said the Court, "Baldridge's conduct was inappropriate on the face of it and it is his conduct and lack of judgment in engaging in this conduct, rather than his intent, which is at issue." Finally, the Court stopped on this issue of unfitness, saying "it is clear that only one of the statutory bases for dismissal need exist." Baldridge was unfit to teach, and that was enough. "As a result," said the Court, "we need not address [the County Superintendent's] conclusions regarding Baldridge's competence or violations of policies ..."

Justice Trieweiler dissented at length, joined by Justice Hunt. At the crux of his dissent was his conclusion that the County Superintendent was right: the undisputed facts about Baldridge's behavior did not constitute unfitness to teach. Trieweiler pointed out that Baldridge received excellent evaluations, was considered a model teacher by peers and students, and received no prior discipline or warnings regarding the conduct that led to his termination. Trieweiler also noted that Baldridge's "activism" in school issues made him a "thorn in the side" of the school administration. Trieweiler would have affirmed the County Superintendent's conclusions.

Powell v. The Salvation Army (1997) — ***discrimination, statute of limitations*** *287 Mont. 99, 951 P.2d 1352*

This case alleges unlawful discharge based on discrimination. The decision turns on the statute of limitations within the Montana Human Rights Act. The Supreme Court ruled that the statute of limitations begins to run when the alleged discriminatory practice occurred or was discovered.

Bill Powell worked as a truck driver for the Salvation Army from the spring of 1993 until his discharge in February 1994. The state reason for his firing was "drinking on the job." Later in 1994, asserted Powell, he learned he had been discharged because of his past alcoholism. Powell filed a grievance with the Salvation

Army; the termination was upheld. In October 1994, 304 days after his discharge, Powell filed a discrimination complaint with the Montana Human Rights Commission. He alleged unlawful discrimination under the Americans with Disabilities Act.

The Human Rights Commission issued a right-to-sue letter in December 1996, and Powell filed suit in District Court. The Salvation Army moved to dismiss the suit, saying Powell failed to timely file his complaint with Human Rights. The Human Rights Act requires a claimant who has gone through the employer's grievance procedure to file a claim within 300 days of suffering or discovering the discriminatory act (§ 49-2-501(4)(b), MCA). Because Powell had filed his complaint 304 days after his discharge, District Court granted Salvation Army's motion.

On appeal, Powell argued that he didn't find out the real reason for his termination until "some months later," after his discharge. He didn't dispute that he was told he was being fired for "smelling of alcohol and having slurred speech." However, he said he didn't find out until later that the Salvation Army had relied on his history of alcoholism in deciding to fire him. This gave rise to his claim that he had suffered unlawful discrimination because of his disability.

Because of the narrow scope of pleadings on a motion to dismiss, the Supreme Court restricted its review to that scope: "Powell may well be able to demonstrate that his cause of action did not accrue until sometime after his February 18, 1994, termination and, therefore, that he complied with the applicable 300-day limitation period." The Court reversed dismissal and remanded the case.

Reeves v. Diary Queen, Inc., and Barber Food Service Co., Inc. (1999) — ***discrimination***
287 Mont. 196, 953 P.2d 703

The Supreme Court adopted a separate test for "direct evidence" cases of discrimination. Applying that test to this case resulted in a remand overturning summary judgment.

Donna Reeves worked for Dairy Queen in Columbia Falls for five years. She was an excellent employee, earning a promotion to kitchen manager. She also suffered high blood pressure. Bill Barber, owner of the restaurant, fired Reeves "due to health reasons." In a reference letter, he described the work-related effects of high blood pressure, concluding that the discharge "would be best for Donna." Before the discharge, Barber never discussed the situation with Reeves.

Reeves filed a complaint with the Human Rights Commission, alleging discrimination because of her disability. The Commission dismissed her case and issued a "right-to-sue" letter. Reeves then filed this suit, claiming unlawful discrimination. District Court held that Reeves's high blood pressure didn't qualify as a disability, that Dairy Queen had a legitimate reason to discharge her, and Dairy Queen could not have given Reeves a reasonable accommodation. The court granted summary judgment to Dairy Queen.

On appeal, the Supreme Court first looked at "standard of proof." Most discrimination cases, said the Court, involve circumstantial evidence. This requires a "shifting burden" analysis to factually determine if discrimination occurred. In "direct evidence" cases, the parties don't dispute the reason for the action, just whether that action was illegal. In these cases, the shifting-burden analysis is "inappropriate and unduly confusing." The Court adopted the direct-evidence test laid out in the Human Rights Commission's administrative rule: "If a charging party has established a prima facie case with direct evidence of unlawful discrimination or illegal retaliation, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief." (ARM 24.9.610(5)).

Did Reeves establish a prima facie case of discrimination? In the eyes of the Court, this required showing : "(1) she belonged to a protected class; (2) she was otherwise qualified for continued employment and her employment did not subject her or others to physical harm; and (3) Dairy Queen denied her continued employment because of her disability."

District Court had ruled that Reeves wasn't in a protected class because Montana law had not established high blood pressure as a disability. The Supreme Court looked at the definition of disability – an impairment that "substantially limits one or more of a person's major life activities." Whether an impairment meets this definition is a factual question, not a matter of finding the condition "on a judicially or legislatively created list of disabilities." The Court held, "whether a person is disabled under the Act cannot be decided as a matter of law, but rather requires a factual determination to be made on a case-by-case basis." "In this case," continued the Court,"there is ample evidence to create an issue of fact regarding whether Reeves is disabled."

Whether Reeves was qualified for continued employment also remained "a disputed issue of fact." Dairy Queen hadn't presented any evidence she couldn't do her job. Barber assumed she posed a risk of harm based on one incident. He never talked to her about the seriousness of her condition. He just let her go. This action also called into question the third element of Reeves's prima facie case, whether Dairy Queen discriminated against her because of her disability.

Reeves also challenged District Court's finding that it was impossible for Dairy Queen to reasonably accommodate her impairment. Dairy Queen never seriously contemplated nor investigated the need to accommodate her. Dairy Queen countered that Reeves never asked for an accommodation. True, said the Court, but "Reeves was not given the opportunity to request an accommodation." By the time she found out how Barber viewed her condition, she was already out of a job. The Court remanded the case.

Kneeland v. Luzenac America, Inc. (1998) — ***WDEA, tort, preemption*** *289 Mont. 201, 961 P.2d 725*

This appeal followed a jury trial that found in favor of the employer. The Supreme Court affirmed the jury verdict.

Bruce Kneeland began working for Luzenac America in 1981. The company's Montana Mines Division operated three talc mines. The early 1990s brought a downturn in the talc market that necessitated reducing the workforce by 58 jobs. Prior to the layoff, the company formed a committee of hourly employees from its three mines. The committee revised the company's layoff policy, laying out a "bid and bump" process for qualified senior employees to stay employed.

Kneeland's job was among those targeted for reduction. He lacked the necessary seniority or qualifications to bump into the four jobs he bid on. As a result, he was laid off in mid-1994. A short time later, Luzenac bought out a competing company and rehired five laid-off employees; Kneeland was not among them.

Kneeland filed suit in September 1994, alleging wrongful discharge and related tort claims. One of the tort claims was "post-termination bad faith," arising from the company's failure to rehire him. In the maneuvering that followed, the parties agreed to a dismissal of the tort claim of "civil conspiracy. Luzenac won summary judgment on claims of intentional infliction of emotional distress and post-termination bad faith. Kneeland's wrongful discharge claim went to trial.

A six-day jury trial in October 1996 resulted in a unanimous verdict for Luzenac. Kneeland moved for judgment as a matter of law or, alternatively, a new trial. District Court denied the motion, and Kneeland appealed.

The first issue was whether District Court erred in granting summary judgment on the claim of post-termination bad faith. District Court had held that the Wrongful Discharge from Employment Act preempted the claim. Kneeland argued it was an issue separate from his discharge. Luzenac asserted that it had no duty to rehire Kneeland, so there could be no breach of good faith. The Supreme Court found

that Kneeland "cannot establish the existence of a contract or special relationship that would support a claim for post-termination bad faith." Furthermore, the claim could not be separated from his discharge, so the Wrongful Discharge from Employment Act preempted it. The Court affirmed summary judgment.

The second issue dealt with two of the instructions to the jury. In one of them, Kneeland had wanted the definition of "discharge" to include language about "failure to recall or rehire." In District Court's instruction, that language was left out. The Supreme Court found no merit in Kneeland's proposed instruction, as he had argued before that Luzenac's post-termination conduct fell outside the Wrongful Discharge from Employment Act. Kneeland challenged another jury instruction, but he had failed to object to the instruction at trial. Consequently, the Court refused to consider the issue on appeal.

The third issue looked at whether substantial evidence supported the jury verdict. The Court noted that Kneeland produced no evidence to the contrary. Indeed, the evidence at trial was "overwhelming" in favor of Luzenac. This result tied directly to the fourth issue — whether District Court had erred in denying judgment as a matter of law or a new trial. The Court held that the post-trial motions lacked any merit. In sum, Kneeland's appeal was fruitless.

*McGillen v. Plum Creek Timber Co. (1998) — **WDEA, procedure, lawful product***
290 Mont. 264, 964 P.2d 18

In this case, the Supreme Court affirmed another jury verdict in favor of the employer. At issue were some technical questions related to the trial. One of these dealt with allowing testimony on incidents apart from the reason stated in the discharge letter. (See *Galbreath v. Golden Sunlight Mines*, page 114.)

Jerry McGillen worked at Plum Creek's sawmill in Columbia Falls from 1980 to 1995. Toward the end of his employment, he received a suspension for sleeping on the job. In apparent retaliation for the discipline, he placed a classified ad offering a truck for sale. The ad gave his supervisor's phone number and said to call late in the evening. The company called this prank an act of intimidation and fired McGillen.

Within a month, McGillen sued Plum Creek for wrongful discharge. Both parties moved for summary judgment. District Court denied both motions, and the case went to trial. The jury found in favor of Plum Creek, and McGillen appealed.

McGillen first argued he should be received a new trial because of juror misconduct. During jury deliberations, one juror had told others that he knew one of Plum Creek's witnesses and felt the witness wasn't intimidating. When the jury informed the court of this occurrence, McGillen moved for a mistrial. The judged asked the juror whether he could be impartial; he said, "Absolutely." The court denied McGillen's motion for a mistrial and later motion for a new trial. The court said (1) the juror's information was irrelevant, (2) the comments were only internal influences and not impeachable, and (3) the jury had already voted in favor of Plum Creek, and the juror's comments did not changed the vote. The Supreme Court affirmed District Court's actions.

Second, McGillen contested District Court's denial of his motion for summary judgment. There may have been factual issues to resolve, he had said, but if the court felt there were none, he was then entitled to summary judgment. District Court had held that whether applying the policy on intimidation amounted to good cause for discharge was a factual issue for the jury. The Supreme Court affirmed this. McGillen had also cited that a 1993 amendment to the definition of good cause that says the legal use of a lawful product away from work is not a legitimate business reason for discharge. McGillen said placing a classified ad is the legal use of a lawful product. District Court noted that "lawful product" refers only to consumable items. The Supreme Court agreed that the term is limited to alcohol and tobacco.

Third, McGillen argued that District Court should have allowed his witnesses to give their opinions about whether his conduct amounted to a violation of company policy. The Supreme Court also affirmed Dis-

trict Court here, saying such opinions would be "irrelevant." Whether McGillen's conduct merited discharge was "a matter for the jury to decide." In addition, McGillen had admitted at trial that he had violated the company's rules.

Finally, McGillen said the trial court had improperly allowed evidence on reasons for discharge other than those stated in his discharge letter. He had been fired for placing the ad, yet the court allowed testimony about his earlier suspension for sleeping on the job. This was out of step with the *Galbreath* decision, said McGillen. The Supreme Court disagreed, saying that any testimony about the suspension was distinct from the reasons for discharge: "Any testimony offered with respect to McGillen being disciplined for sleeping on the job was relevant and, therefore, admissible, to tell the jury about a possible motive for McGillen placing the ad in the first place."

Moore and Moore v. Imperial Hotels Corporation (1998) — ***WDEA, procedure***
291 Mont. 164, 967 P.2d 382

Coming before the high court a second time, the plaintiffs contested four rulings by District Court in their wrongful discharge trial. The rulings dealt with a moot issue of a wage and hour claim and three jury instructions. The Supreme Court affirmed District Court and, as a result, upheld the jury verdict in favor of the employer.

Linda and Gary Moore, a married couple, signed on with Imperial Hotels Corporation as trainees in January 1994. For four weeks, they learned about the business at the company's Bozeman Econo Lodge. At the end of their training, Imperial hired them to work at the Billings Econo Lodge — Linda as resident manager and Gary as maintenance employee. Each signed an employment agreement. Gary's agreement stated he would not work over 40 hours a week without approval from the district manager.

A couple months later, an inspector from the US Department of Labor (USDL) visited the motel. Gary told the inspector he was working unpaid overtime. The inspector determined that Gary and Linda had not reported any overtime hours to Imperial. Nor did they report any overtime after the inspection.

In August 1994, Imperial fired the Moores for lack of control and carelessness in managing the motel. Shortly thereafter, the Moores filed a wage and hour claim with the USDL. Their claim was assigned to the same inspector who had dealt with them four months earlier. After investigating the claim, he concluded it was groundless. In October 1994, the Moores filed suit, alleging wrongful discharge and violation of wage and hour laws. The case came before a jury, which found in favor of Imperial.

On appeal, the Moores argued that District Court erred in ruling that federal, rather than state, law applied to their wage and hour claims. However, whether to apply state or federal law related only to damages. Because the jury found the Moores had no entitlement to damages, the issue was moot.

Second, the Moores appealed District Court's refusal to include three of their proposed instructions to the jury. The first of these set forth the law that says employees required to be on duty 24 hours or more may claim sleep time as work time. The Supreme Court found this law "irrelevant," as "Gary was not such an employee." He lived on premises, but was not required to be on duty. In fact, he was limited to 40 hours a week on duty. The Court affirmed District Court's ruling.

Another instruction the Moores had proposed laid out the elements of wrongful discharge as set forth in § 39-2-904, MCA. District Court had excluded the element of wrongful discharge in retaliation for refusing to violate public policy or for reporting a violation of public policy. District Court had upheld Imperial's objection to this element on the grounds that the Moores had never alleged they were discharged for refusing to violate public policy. The Supreme Court found that "no facts exist to support" the Moore's theory that they were, in fact, discharged for refusing to violate public policy.

Finally, the Moores argued that District Court erred in refusing a third proposed instruction regarding Imperial's burden of proving that the Moores had failed to mitigate their damages. If there were any error here, said the Supreme Court, it was harmless, as "the jury never reached the issue of damages." Strike three on the instructions issue, and the Moores were out.

Jarvenpaa v. Glacier Electric Cooperative, Inc. (1998) — WDEA, procedure, counterclaim
292 Mont. 118, 970 P.2d 84

This decision is the second by the Supreme Court in this case (see page 118). The first decision held that, even though the plaintiff had accepted early retirement, he could allege a constructive discharge and proceed with his wrongful discharge action. The ensuing trial on remand ended in the employer's favor, and the plaintiff was ordered to repay his early retirement benefits. The Supreme Court affirmed.

Donald Jarvenpaa worked for Glacier Electric for about 30 years. Late in 1992, his employment ended. His company had given him a choice — take early retirement or be fired. Jarvenpaa chose retirement. However, he also sued, alleging wrongful discharge under all three elements in § 39-5-904, MCA.

As the case continued in District Court after the first appeal, several rulings took place that led to this appeal. First District Court allowed Glacier to file a counterclaim for Jarvenpaa's early retirement benefits; the court later denied Jarvenpaa's motion for summary judgment against the counterclaim. Jarvenpaa then moved to bifurcate (separate) Glacier's claim from his own, but the court denied it. During trial, the court allowed Glacier to introduce some post-termination evidence and disallowed parts of testimony that Jarvenpaa wanted from his expert witness. The jury found in Glacier's favor, awarding the company $106,000 of Jarvenpaa's early retirement benefits, plus $24,000 interest. Jarvenpaa appealed.

Glacier's counterclaim was the first issue on appeal. Jarvenpaa argued that his wrongful discharge suit didn't negate his retirement agreement. Further, his signed retirement agreement contained no release to protect Glacier from further claims, so why should Glacier get the same effect as if there were a release? The Court agreed with Glacier: Jarvenpaa had a choice to retire or be fired, and he made the choice. "Jarvenpaa could not elect both; hence, he could not elect to receive the benefits of both." The Court concluded that "there are only two circumstances under which Jarvenpaa could keep his early retirement benefits: (1) if he, in fact, retired, which he did not do ...; or (2) if he was wrongfully discharged, then he could have applied his early retirement benefits as an offset against any wrongful discharge damages he was awarded. Neither of these scenarios occurred."

Jarvenpaa also appealed District Court's refusal to bifurcate Glacier's claim. He argued that allowing the two claims to proceed together was prejudicial to his wrongful discharge case. The Court disagreed: "Evidence of Jarvenpaa's retirement election was helpful to the jury to make a well informed decision of whether Jarvenpaa was wrongfully discharged."

Another issue on appeal was Jarvenpaa's goal of showing that Glacier had a written personnel policy. He had argued that the policy stemmed from a selection of written materials from a management consultant Glacier had hired. At trial, Jarvenpaa had wanted his expert witness to testify that these materials constituted a personnel policy and that Glacier had violated the policy. In addition, he had proposed jury instructions that said a personnel policy could arise from other writings. District Court had restricted the expert witness's testimony and refused his proposed instructions.

District Court had allowed the witness to testify on common management standards and whether such standards were apparent in Glacier's materials. The judge also had allowed testimony on whether Glacier violated personnel policy, if there had been a policy. But the court left it to the jury to determine if, in fact, a policy existed. The Supreme Court agreed: "the precise issue was whether a written personnel policy was even in existence." This was up to the jury to decide, not the witness.

Jarvenpaa contested the trial court's admission of certain "after-acquired" evidence. He argued that the evidence should be limited to what Glacier wrote in its discharge letter and to what occurred before the letter. Trial court had allowed testimony about improved morale after Jarvenpaa retired and about his successors' handling the job better. The court had determined "that Glacier's proffered evidence was relevant and admissible because it tended to prove the truth of the allegations Glacier made in its letter..." The Supreme Court cited precedent: "an employer should be limited to introducing only those reasons itemized in a discharge letter as the reasons justifying termination." Here, said the Court, "Glacier did not offer evidence to present collateral reasons for Jarvenpaa's discharge. Instead, it offered evidence to substantiate the reasons it had already given in the ... letter." The Court unanimously affirmed on all issues.

Batoon v. City of Conrad (1998) — ***WDEA, policy, damages, due process, discrimination***
1998 MT 313N (unpublished)

This is a complex but non-cite case in which both parties appealed to the Supreme Court. The issues involved some factual examination of personnel policy, damages, due process, and discrimination.

Josephine Batoon, a Filipina, worked as an office clerk for the City of Conrad from September 1976 until October 1988. In early October 1988, Batoon was supposed to return to work after an extended leave of absence. Well, deaths in the family in Philippines caused a delay in her return, so she was absent from work for an extra five days without any notice or approval.

City policy, which Batoon had signed, said that two occurrences of two unexcused absences within a year would result in discharge. The City counted each day of Batoon's extra absence as a separate occurrence. After four days of her absence, the City sent her a letter saying she would be fired unless she could show reasonable cause for her absence. Batoon responded immediately with a letter describing the reasons for her absence. A few days later, the City held a hearing for her to present her reasons. After that, the city council voted to terminate her employment.

About a year later, Batoon filed suit, alleging wrongful discharge, defamation, discrimination, and violation of her civil rights. Over the next six and one-half years, several actions took place in District Court. The parties agreed to dismiss the defamation claim. The City moved for summary judgment, which the court denied. The court bifurcated Batoon's wrongful discharge claim from her civil rights claims. The court found that the City had wrongfully discharged Batoon. The court further found that her discrimination and civil rights claims were unsupported by the evidence. The court awarded costs and damages to Batoon for wrongful discharge. The City moved for an amended judgment, which the court denied. The City appealed the wrongful discharge judgment, and Batoon appealed the civil rights judgment.

The first issue on appeal was perhaps the most important one: how should the City have treated Batoon's absence? District Court had held, and the Supreme Court agreed, "that an uninterrupted absence for four days without any intervening notice from the City ... must be treated as a single absence or a single offense." With this interpretation of the City's policy, Batoon's conduct did not reach the level that merited discharge. The Court rejected the City's argument that it could reasonably conclude that Batoon had "abandoned" her job; there was no evidence to support it. "The City," said the Court, "should have complied with its own written personnel policies ... and given Batoon notice of her violation and an opportunity to correct the problem." Because it didn't, the City wrongfully discharged her under § 39-2-904(3), MCA.

The City contested the award of damages to Batoon. It alleged that she spent little time looking for work, and thus "did not exercise reasonable diligence to mitigate her damages." However, the Court found that "the record does not reflect any refusal or failure on Batoon's part to seek employment. In fact, the record in this case demonstrates that Batoon went out of her way to find employment ..." Damages were appropriate.

The City also advanced a theory that Batoon was not entitled to maximum damages. The idea was that a discharge in violation of the employer's policy "is the third and least grievous basis for wrongful discharge." On some sliding scale of grievousness, Batoon would be entitled to something less than full damages. The Court didn't buy it, saying the law "does not indicate in any way that one type of wrongful discharge is entitled to more or less damages than the others."

Also on the issue of damages, the City contended that Batoon "had a duty" to accept a job offer in Nevada to mitigate her damages. The Court cited its precedent in *Dawson v. Billings Gazette* (see page 21) that set a standard of "ordinary diligence" to mitigate damages. Here, said the Court, "Batoon did seek employment with ordinary diligence and was not required to move to a different state to obtain employment."

Next, the City contested the award of interest on Batoon's damages. Citing state law and precedent (*Weber v. State of Montana*, see page 82), the City argued that District Court should have amended its judgment to disallow interest. The Supreme Court said it was a matter of timing. In *Weber*, the employer moved for an amended judgment before either party filed a notice of appeal. In this case, the City waited more than five months after notices of appeal were filed. The City was asking District Court to act when it no longer had jurisdiction over the case. The award of interest stood.

Finally, the City wanted Batoon, as cross-appellant, to have to share the cost of producing the District Court transcript on appeal. No dice, said the Court: "only the successful part on appeal is entitled to recover his or her costs from the other party." The City was unsuccessful. In addition, the City filed its appeal first. Under Rules of Appellate procedure, "the first part to file an appeal is deemed the 'appellant' for purposes of other rules of appellate procedure." And another rule says the appellant pays for the transcript.

The Court then turned to Batoon's issues on appeal. First, she thought District Court erred in saying she had no property interest in her job. She argued that the Wrongful Discharge from Employment Act, in concert with the City's personnel policies, created a property interest. The City's policies contained language about "fairness and consistency," along with "an opportunity to provide a 'reasonable' excuse for his or her conduct." However, said the Court, such language did not rise to the level of "state regulations" like those in *Boreen v. Christensen* (see page 108): "the language of the City's personnel policy manual does not create a property interest in employment sufficient to trigger the due process protections ..." This holding washed out the foundation on which Batoon built her claim that the City had violated her civil rights.

The final issue dealt with Batoon's claim that she suffered racial and age discrimination. District Court had agreed that she established a *prima facie* case by showing the City had hired a younger, Caucasian person into her job. However, she did not produce any evidence to show that the City's stated reason for firing her — the absences — was a pretext. "Batoon has not convinced this court that the reason for her discharge was age or race discrimination."

Justice Trieweiler dissented in part. He took issue only with the holding that Batoon had no property interest in her job. Trieweiler agreed with the theory that the Wrongful Discharge from Employment Act itself creates a property interest in continued employment. The question had come up briefly in *Boreen*, but the Court had sidestepped it. Here, said Trieweiler, the provision that a "discharge is wrongful ... if ... the discharge was not for good cause ..." provides a specified term of employment that lasts until there is good cause for discharge. "In other words, employees in Montana are provided the same right to employment absent good cause for termination pursuant to statute that the employee in *Boreen* was provided by administrative rule." Trieweiler concurred on all other issues in the decision.

Delaware v. K-Decorators, Inc. and Judson (1999) — ***WDEA, good cause*** *293 Mont. 97, 973 P.2d 818*

The Supreme Court's review in this case turned solely on whether the plaintiff had introduced enough

evidence to preclude summary judgment. The Court ruled that he had and reversed the summary judgment.

Frank Delaware was employed twice by K-Decorators in Billings, first for a year in the mid-1980s as a salesman. Although he was fired from that job, the company rehired him in 1900 as sales manager. He continued in that job for three years and succeeded in substantially increasing the sales volume. In September 1993, the company president, Lee Judson, told Delaware that the company was going to "reorganize." He removed Delaware from the sales manager job but offered to keep him on as a salesman. Delaware refused the job.

In September 1994, Delaware filed suit, claiming wrongful discharge and unpaid wages. After a lot of legal wrangling, District Court granted K-Decorators' motion for summary judgment on the wrongful discharge claim. The court held, as a matter of law, that reorganizing the company and eliminating Delaware's job was a "legitimate business reason" within the "good cause" definition of the Wrongful Discharge from Employment Act. The court said Delaware produced no evidence to the contrary, so summary judgment was appropriate. Delaware contested the judgment as one issue in his appeal.

Delaware contended that the record showed conflicting evidence about K-Decorators' reason for discharging him. The Supreme Court framed the issue within the Wrongful Discharge from Employment Act: "To prevail ..., employees must first prove that they were discharged within the meaning of the Act. The employee must then prove that the discharge was wrongful." Citing *Buck v. Billings Montana Chevrolet* (see page 70), the Court said, "An employee seeking to defeat an employer's argument that the employee was discharged for a legitimate business reason ... must offer evidence upon which a fact-finder could determine that the reason given by the employer was false, whimsical, arbitrary or capricious, or unrelated to the needs of the business."

K-Decorators relied heavily on *Buck* to support summary judgment. The Court, however, noted that "Delaware does not argue that restructuring or reorganizing a business is not a legitimate business reason. Rather, he argues that the affidavits he filed ... could lead a fact-finder to conclude that K-Decorators' proffered reason is false or pretextual." The Court agreed with Delaware.

The affidavits in question came from three salesmen who continued working for K-Decorators after Delaware's departure. Each of them stated that few, if any, changes took place in the sales department. "These affidavits are neither mere denial nor speculation," said the Court; "they are direct evidence that K-Decorators did not restructure or reorganize." The Court found this enough evidence to call into question K-Decorators' reason for discharging Delaware. The Court reversed and remanded the case.

Braulick v. Hathaway Meats, Inc. (1999) — ***WDEA, good cause*** *294 Mont. 1, 980 P2d. 1*

The Supreme Court upheld a jury verdict in favor of the plaintiff. The Court emphasized the role of the jury to weigh the evidence.

Tim Braulick worked for a Great Falls meat wholesaler. Hathaway Meats bought the company in October 1994. Later citing a need to downsize, Hathaway fired Braulick in February 2006. In the ensuing lawsuit, Braulick said he was fired because of an injury-related absence and the cost of health insurance. In court, Hathaway argued that Braulick presented no evidence that the company lacked good cause to fire him; Hathaway moved for judgment as a matter of law. District Court denied the motion, and the jury found for Braulick, awarding $31,500 in damages. Hathaway appealed.

The record contained conflicting evidence about good cause for Braulick's discharge. Hathaway cited slow business; Braulick was called in several times the month before his discharge because things were "really busy." After the discharge, Hathaway contracted with another company and hired part-time workers to cover Braulick's job. Hathaway said Braulick wasn't certified to drive the big truck; Braulick pointed out that the company repeatedly told him to use the small truck. Hathaway cited a small profit margin in April 2006; Braulick noted that those figures weren't known until after he was fired.

"On several points," said the Court, "the jury had to decide whether to believe testimony by Braulick or ... Hathaway." Noting that Hathaway presented some evidence of its "legitimate business reason," the Court said it was "not a sufficient basis for a judgment as a matter of law. The standard is whether Braulick failed to introduce any evidence in support of his contentions. Weighing of the evidence is, once again, a classic jury function." The Court affirmed District Court's denial of Hathaway's motion and let the verdict stand.

On appeal, Braulick had asked for damages against Hathaway for taking an "appeal without merit." The Court denied the request.

Whidden v. John S. Nerison, Inc. (1999) — ***WDEA, probation*** *294 Mont. 346, 981 P2d. 271*

Twelve years after passage of the Wrongful Discharge from Employment Act, the Supreme Court addressed its impact on Montana's at-will statute. This case led the 2001 Legislature to repeal 39-2-503, MCA, and clarify probation under the WDEA.

Renae Whidden went to work for Nerison in 1988 and continued until 1994. In 1994, she filed a workers' compensation claim and a wage claim for vacation pay. Nerison discharged Whidden as an "at-will employee" under 39-2-503, MCA. This led Whidden to file suit, claiming retaliation for the workers' comp and wage claims, as well as wrongful discharge without good cause. The case went through a jury trial; the jury concluded Nerison had not retaliated against Whidden, but had fired her without good cause. Damages came to $9,000. Nerison appealed.

Nerison challenged a jury instruction that focused on the "good cause" element of wrongful discharge. According to Nerison, the Supreme Court had affirmed the at-will doctrine in *Medicine Horse v. Big Horn County School District* (see page 78). In addition, Whidden was a "nonprobationary" employee; that is, she had never completed a probationary period, so the WDEA's language didn't apply to her ["the discharge was not for good cause and the employee had completed the employer's probationary period," 39-2-902(2)]. Nerison recognized the conflict between the at-will statute and the WDEA, but said it's up to the Legislature to fix the problem. Whidden also recognized the conflict. She argued *MacMillan v. State Compensation Insurance* (see page 132) applied the WDEA to all "formerly at-will" employees.

The Supreme Court nodded toward Nerison's reliance on *Medicine Horse*. However, said the Court, several other cases, especially *MacMillan*, point the other direction regarding the WDEA: "The plain, reasonable meaning of this language is that outside of a probationary period of employment, an employer may not discharge an employee without good cause." As the upshot of this, the WDEA "has superseded and impliedly repealed the at-will act." In so holding, the Court overruled *Medicine Horse*.

The Court recognized the WDEA's good-cause requirement kicks in when an employee completes probation. But never having a probationary period doesn't provide a loophole. "The employer must define the probationary period at the outset of the employment relationship, and the employer has the burden of showing that a probationary period was in effect at the time of the discharge."

The 2001 Legislature responded to this case by passing Senate Bill 4. It amended 39-2-902, MCA, removing all reference to at-will employment. It also amended 39-2-904 by adding this language: "(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason. (b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire."

Nelson v. Livingston Rebuild Center, Inc., L.R.C. Sales, Inc., and Peterson (1999) — ***WDEA, arbitration*** *294 Mont. 408, 981 P2d. 1185*

The crux of this case addressed whether an arbitrator properly awarded damages for wrongful discharge. The Supreme Court determined that the arbitrator had exceed his legal authority in amending damages; the Court reinstated original damages.

Bruce Nelson worked eight years for the Livingston Rebuild Center. The company president fired him on the grounds of a disputed performance issue. Nelson later got a job in Chicago, but commuted from the home he kept near Livingston. The first dispute from the discharge was an administrative hearing on unemployment benefits. Nelson contested the initial denial based on misconduct and succeeded in getting the benefits.

Nelson then filed a wrongful discharge complaint, and the parties agreed to arbitrate the case under the terms of the Wrongful Discharge from Employment Act. The arbitrator ruled that Nelson's discharge was wrongful. He calculated Nelson's total loss at $426,199, then deducted the earnings from Nelson's new job, bringing the net damages to $94, 569.

LRC took the case back to District Court and filed a motion to vacate certain portions of the award: (1) extra living expenses for commuting to Chicago and (2) attorney fees related to the unemployment hearing. District Court didn't decide the motion; rather, it sent the issue back to the arbitrator. The arbitrator then modified the award in line with LRC's motion, reducing damages to $28,673. District Court approved the change, and Nelson appealed.

Nelson argued that District Court shouldn't have sent the issue back to the arbitrator because the arbitrator lacked legal authority to amend the award. LRC argued that the arbitrator exceeded his authority with the initial award, but had proper authority to fix the problem. The dispute fell under the Montana Uniform Arbitration Act and the powers it delegates to courts and arbitrators. "When the arbitrator granted LRC's motion to vacate portions of the original damage award," said the Supreme Court, "he made substantive modifications to the original award, rather than the corrections or clarifications which he was authorized to make pursuant to §27-5-217, MCA [section of Uniform Arbitration Act]." Thus, District Court erred in giving the case back to the arbitrator.

LRC argued further that the arbitrator awarded improper damages under the Wrongful Discharge from Employment Act – attorney fees for the unemployment dispute and living expenses for the Chicago job. Nelson claimed these costs were properly incidental to obtaining new employment, as allowed by 39-2-905, MCA [section of Wrongful Discharge from Employment Act]. The Supreme Court didn't look at the merits of the dispute; it held that the arbitrator hadn't exceeded his authority. The Court remanded the case with instructions to reinstate Nelson's original award.

Justice Gray dissented. She agreed that District Court erred in sending the case back to the arbitrator. The dissent centered on whether the arbitrator had exceeded his authority in awarding damages in the first place. Gray wrote that the disputed damage amounts went beyond the types allowed under the Wrongful Discharge from Employment Act. It should have been the Court's job, she said, to decided that the arbitrator was wrong.

Poeppel v. Flathead County (1999) — ***estoppel, statute*** *294 Mont. 487, 982 P.2d 1007*

In this decision, the Supreme Court clarified a point of procedure in litigation. It also ruled on the former employee's lack of entitlement to vacation leave under statutory language.

Flathead County discharged Richard Poeppel five months and 18 days after hiring him. The County said Poeppel was still on his six-month probation. Because of this probation, his bossed refused to hear his grievance. He met with a county commissioner who sympathized but reiterated that Poeppel was proba-

tionary and now was beyond the six-day period for filing a grievance. His union steward echoed those conclusions. As it turned out, the probationary period was two months and the window to file a grievance was 20 days. By the time Poeppel learned this, a couple months had passed. When he tried to file a grievance then, the County refused it. Poeppel persisted, filing a second grievance seeking arbitration and asking to be paid his unused vacation leave. Again, no go.

Poeppel filed suit, seeking an order to compel arbitration and vacation pay. He argued that confusing actions by the County estopped them from saying his grievance was untimely filed. District Court dismissed his plea for estoppel, effectively ending his lawsuit. Poeppel appealed. The County responded by arguing that he'd failed to present the six elements of estoppel (see *Dagel v. City of Great Falls*, page 76).

The Supreme Court held that the applicable Rule of Civil Procedure "does not require particularity in the pleading of estoppel," only that the pleading be "simple, concise, and direct." As long as the pleading provided enough information for the County to respond, it's enough. "Whether Poeppel can satisfy the six elements of estoppel is a question of proof, not pleading." The Court reversed the lower court ruling.

Poeppel also claimed entitlement to his unused vacation leave. Because he had completed probation, he argued, he should get the payout. State law allows the payout only after the employee has worked six months (2-18-617, MCA). The Court noted that the law "is not couched in terms of 'probationary' periods; it simply requires six months of service to qualify ..." Poeppel didn't get the money.

Winchester v. Mountain Line, Plumley, and Board of Personnel Appeals (1999) — ***collective bargaining agreement, unfair labor practice*** *294 Mont. 517, 982 P.2d 1024*

This case hinged on a union contract. The Supreme Court held that District Court had erred in its interpretation of the collective bargaining agreement.

Steve Winchester drove bus for Mountain Line in Missoula. When the district discharged him for a policy violation, he filed a grievance under the terms of the union contract. The district upheld his discharge, so the union requested arbitration. Winchester also filed a charge of unfair labor practice with the Board of Personnel Appeals. He alleged that protected union activity was the real reason for his termination, in violation of state law. Mountain Line asked the Board to defer to arbitration under the contract.

The Board's investigator put together a Recommended Order to dismiss Winchester's claim but maintain jurisdiction, pending outcome of arbitration. Winchester objected to this proposal, moving the case toward hearing. Meanwhile, an arbitration hearing on his discharge took place; the arbitrator upheld Winchester's discharge.

Several months later, Mountain Line moved the Board to dismiss the unfair labor practice claim, saying arbitration had settled the issue. Winchester responded that the arbitration clause of the union contract excluded claims made under state law. A hearing officer ruled in Winchester's favor. Mountain Line objected to this outcome, triggering a hearing before the Board. The Board ruled that the union contract prohibited discrimination because of union activities, so the arbitration clause was Winchester's proper avenue. The Board dismissed Winchester's claim.

Winchester took this issue to District Court, which affirmed the Board's decision. In his appeal, the Supreme Court examined federal and state precedent. In particular, *Small v. McRae* (see page 10) held that a claim could sidestep arbitration only when it's "certain" that the contract doesn't cover the issue. In this case, a section of the union contract clearly excluded "any alleged violation ... of state statutes." Thus, the proper avenue for Winchester's claim was not arbitration. The Court remanded the case.

Quick v. Bozeman School District #7 (1999) — ***statute, due process*** *295 Mont. 240, 983 P.2d 402*

As in the preceding case, the Supreme Court reversed District Court's judicial review of a protracted administrative process. The result was to affirm the discharge of an assistant principal.

Martha Quick served as tenured assistant principal at Bozeman High School. In 1995, she applied for both open principal slots at the high school and middle school. Even as she interviewed for the middle-school job, she was set to publish a letter to the editor calling the process a sham. When she didn't get either job, she filed a grievance with the school board, which it denied. Meanwhile, the two new principals each told the district superintendent that they'd take on the jobs only if Quick wasn't working for them. Based on this, the superintendent recommended the Board not renew Quick's contract.

The Board gave Quick a hearing, then voted to discharge her. Both the County Superintendent of Schools upheld the Board's decision, affirmed by the State Superintendent of Public Instruction. Quick filed for judicial review in District Court. The court agreed with the County Superintendent's findings of fact and conclusions of law. However, the court said the process failed to consider Quick's rights to due process and free speech. It reversed the administrative decision and ordered that Quick be reinstated with back pay and benefits. The school district appealed.

Quick had argued that the meeting of the district superintendent with the principals was an "evaluative discussion" that violated district policies because she had no notice and opportunity to be heard. The County Superintendent had considered this argument and rejected it. District Court concluded that the meeting violated due process. The Supreme Court held that District Court exceeded its statutory authority in substituting its judgment for the County Superintendent's.

The free-speech issue involved Quick's critical letter to the editor. District Court had said this issue invoked the first amendment and required a thorough analysis. The Supreme Court looked at the administrative record. In it, the County Superintendent had said the free-speech issue "did not require resolution, because the basis for Quick's termination was a loss of confidence and trust on the part of the other administrators." For District Court to decide otherwise, said the Supreme Court, was wrong.

Aside from due process and free speech, District Court had concluded that the district had good cause to discharge Quick. In a cross-appeal, Quick disputed this: her co-workers' opinions and unwillingness to work with her failed to establish good cause. The Supreme Court found the proper "nexus" between Quick's conduct and her ability to serve effectively. It affirmed District Court.

Quick also contended that the district's termination letter lacked the clarity to satisfy statutory requirements for clear and explicit reasons. District Court had stricken three paragraphs from the letter, yet held that the first two paragraphs were sufficient to support the discharge. The Supreme Court held that District Court erred in striking three paragraphs; with the original letter taken "as a whole," it satisfied the requirements of the law. Overall, the Court reinstated the decision to uphold Quick's discharge.

Justice Leaphart dissented on the issue of Quick's free speech. He said the County Superintendent's conclusion that the first-amendment issue didn't require resolution was a legal conclusion. Leaphart said District Court had the authority to reverse an incorrect conclusion of law. Citing the administrative record, Leaphart wrote,"Having stated the letter was *not relevant* and having cited two instances of relevancy, it is clear that the [County] Superintendent viewed the letter as a relevant if not key factor in the decision to terminate."

Dahl v. Fred Meyer, Inc. (1999) — ***WDEA, exemption, arbitration*** *297 Mont. 28, 993 P.2d 6*

This decision bolstered the finality of arbitration findings.

Fred Meyer fired Phil Dahl in April 1994. Dahl filed a suit under the Wrongful Discharge from Employment Act, claiming the discharge lacked good cause and violated the employer's policies. Dahl pinned

Fred Meyer's motive on the high value of his fringe benefits. The parties agreed to arbitration. Fred Meyer then moved to dismiss the arbitration, saying that Dahl 's complaint properly fell under the Employee Retirement Income Security Act. The arbitrator agreed and dismissed the case.

Back in District Court, Fred Meyer moved for confirmation of the arbitrator's decision; Dahl asked to amend his complaint to delete the portion involving ERISA. District Court granted Fred Meyer's motion and denied Dahl's request, leading to this appeal by Dahl.

Dahl first argued that the arbitrator lacked the jurisdiction to decide on the federal exemption. However, noted the Supreme Court, Dahl "failed to object to the arbitrator's decision either before the arbitrator or before the District Court." This failure "waived his right to object to the arbitrator's ruling on appeal." Dahl argued that he should have been able to amend his complaint. The Supreme Court held that District Court lacked the jurisdiction to allow that. Once the parties agreed to arbitration, District Court's role shrank to confirming, modifying, or remanding the arbitrator's decision. When Dahl agreed to confirming the decision, his legal options were at an end.

*Halvorson v. Montana State Department of Labor and Industry Board of Appeals and Alpine Aviation (2000) — **unemployment benefits** 2000 MT 26N (unpublished)*

In this non-cite case, the Supreme Court upheld denial of unemployment benefits based on misconduct. Any claim of wrongful discharge would fall under the same set of facts as res judicata.

Alpine Aviation fired Greg Halvorson as a pilot. The Department of Labor and Industry initially granted unemployment benefits, and Alpine appealed. Ultimately, the Board of Labor Appeals denied Halvorson's claim. On judicial review, District Court affirmed the decision.

On appeal, the Supreme Court found substantial evidence to support the decision. Halvorson violated federal regulations and Alpine's policies, and it was clear he knew about them. The Court also noted, "Nothing in the record suggests that these regulations were unreasonable." The Court affirmed.

On a second issue, the Court examined Halvorson's theory that his discharge was retaliation for reporting Alpine's FAA violations. District Court had concluded that this formed a wrongful discharge claim, but it wasn't relevant to the issue of Halvorson's unemployment benefits. The Supreme Court upheld the "decision not to decide Halvorson's wrongful discharge claims as part of his unemployment benefits action."

*Haider v. Frances Mahon Deaconess Hospital (2000) — **WDEA, costs, procedure** 298 Mont. 203, 994 P.2d 1121*

In appealing an adverse decision, the hospital failed to comply with a rule of appellate procedure. As a result, the Supreme Court dismissed its constitutional challenge to a provision of the Wrongful Discharge from Employment Act.

Alyce Haider had filed a wrongful discharge claim against the hospital. Haider offered to submit the case to arbitration, which the hospital refused. The case then went to a jury trial, concluding in Haider's favor to the tune of almost $45,000. In addition, District Court tacked on $15,000 in attorney fees under §39-2-915, MCA. That section of the Wrongful Discharge from Employment Act provides that a party who offers to arbitrate a claim is entitled to attorney fees if (1) the offer is rejected and (2) the party prevails in court.

The hospital filed an appeal, challenging the constitutionality of the law. Three months later, in August 1999, it filed its notice under Rule 38 of the Montana Rules of Appellate Procedure. The rule governs cases involving constitutional questions when the state is not a party. The rule requires giving notice of the constitutional challenge at the same time as the appeal. As a result, the hospital "failed to procedurally comply with an essential condition precedent to perfecting its appeal."

The hospital asked for a pass, saying it had relied on the "old" rule, which had been in effect until October 1, 1997. Even giving the benefit of the doubt, said the Court, the old rule required "immediate notice," and the hospital had clearly failed that requirement. As a result, the Court refused to consider the constitutional challenge.

Justice Nelson specially concurred. He wouldn't even have considered giving the hospital a pass, since the new rule had been in effect for 20 months. "Failure to regularly check the very sources where rule amendments and new rules are sent and are published is the fault of no one except the attorney who does not keep current with his or her reading."

Solle v. Western States Insurance Agency, Inc. (2000) —**contract, covenant, arbitration, WDEA**
299 Mont. 237, 999 P.2d 328

A contract's a contract, and common-law wrongful discharge is so 1980s. Here, the Supreme Court affirmed the contractual requirement for arbitration.

Diana Solle worked as a contract employee for WSIA for nine years, eventually becoming branch manager of the company's Missoula office. She worked under written contracts that expired at the end of each calendar year. Each contract carried an arbitration clause covering any dispute arising under the contract. At the end of 1997, WSIA didn't renew Solle's contract. She filed a lawsuit of common-law wrongful discharge. She claimed she had a reasonable expectation of contract renewal and that failing to renew violated the covenant of good faith and fair dealing. WSIA moved to compel arbitration, and District Court granted the motion.

The Supreme Court framed the question as this: "Whether Solle can maintain a claim for wrongful termination apart from either the Wrongful Discharge from Employment Act or the employment contract." The short answer is "no." Solle relied on *Dare v. Montana Petroleum Marketing* (see page 12). However, said the Court, "claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law." The Wrongful Discharge from Employment Act preempts such claims and exempts any claims under a written contract for a specified term.

Solle agreed that the WDEA didn't apply to her situation because of the contract. However, she argued that the arbitration clause of the contract didn't apply to her case. Said the Court, "Solle cannot have it both ways." At heart of the original dispute was Solle's claim that WSIA violated its own policies and WSIA's stance that Solle performed poorly. Solle argued that the arbitration clause didn't cover this type of dispute. The Court ruled that Solle had to pursue any legal claim under the terms of the contract.

Does that mean the arbitration clause applied? That depended on two factors, said the Court: (1) Did the parties agree to arbitrate? (2) Did the dispute arise under the contract? On the first question, the Court said it was clear that the parties agreed to arbitrate. On the second question, Solle argued that her claim didn't arise under the terms of the contract, but on a failure to renew the contract. The Court recognized that "the arbitration clause did not explicitly provide that it would govern issues concerning nonrenewal of the contract. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after the termination of the contract." Thus, her claim was subject to arbitration.

Justice Trieweiler dissented. He said it was a "faulty premise" to hold that Solle's claim must be subject to either the Wrongful Discharge from Employment Act or the arbitration terms of the contract. She should have been able to pursue a tort claim. The arbitration clause, Trieweiler pointed out, governed provisions of the contract. Since the contract contained no provision regarding renewal, the dispute over nonrenewal should not have been subject to arbitration.

Radakovich v. Board of Trustees, Daniels County School District No. 1, and Keenan (2000) — ***due process, arbitration, statute*** *2000 MT 176N (unpublished)*

In this non-cite opinion, the Supreme Court found significant errors in the due-process review of a teacher's termination. The case came back on a second appeal in 2006 (see page 178).

Mike Radakovich, a tenured teacher in Scobey, lost his job in 1994 during a reduction in force. At the same time that his union grieved the termination, Radakovich appealed to the County Superintendent. The grievance led to arbitration, and the arbitrator found no violations of the collective bargaining agreement. The County Superintendent didn't revisit the contractual issues, but found that the District had complied with the law and with precedent. Radakovich appealed to the State Superintendent, who upheld the decision. Radakovich then took his case to District Court, which ruled that the arbitrator was wrong – state law required RIFing non-tenured teachers before tenured teachers. The court ordered the School District to reinstate Radakovich.

On appeal, the School District argued that the arbitrator's decision was *res judicata* and District Court was wrong to review it. The Supreme Court agreed, holding that District Court overstepped the bounds of the Uniform Arbitration Act in reviewing the arbitrator's decision.

That wasn't the whole of it, though. The Court also found that the administrative review was deficient. The County Superintendent failed to follow the law required concise findings of face and conclusions of law. The County Superintendent also failed to address an issue that Radakovich raised. The State Superintendent likewise fell short of the law in her decision. And when District Court "substituted its own findings concerning the RIF criteria and 'methodology,'" it exceeded its authority. The Supreme Court remanded the case to the County Superintendent.

Burkhart v. Semitool, Inc. (2000) — ***WDEA, arbitration, attorneys*** *300 Mont. 480, 5 P.3d 1031*

When the parties agree to arbitrate a wrongful discharge claim, District Court no longer has jurisdiction. An plaintiff who is an attorney may press a claim for wrongful discharge, even if it means divulging confidential information.

Patrick Burkhart started working for Semitool as a patent attorney in December 1996. Semitool's letter offering the job contained an arbitration clause. Things didn't work out, and Semitool fired Burkhart in August 1997. Burkhart filed suit under the Wrongful Discharge from Employment Act, claiming the discharge 1) lacked good cause and 2) was retaliation for refusing to violate public policy. Invoking the WDEA, Semitool sought arbitration, and Burkhart agreed. Semitool then moved District Court for summary judgment on failure to state a claim. District Court granted summary judgment; Burkhart appealed.

Once the parties agreed to arbitration, Burkhart argued, District Court lacked jurisdiction to decide the merits of his claims. Semitool countered: because the court had determined that the parties didn't have a valid agreement to arbitrate, summary judgment was proper. The reasoning on the validity of the agreement went this way: proving Burkhart's allegations would require disclosing confidential attorney-client information. That would violate the public interest in preserving the confidential nature of the relationship. So, an arbitration agreement requiring that violation would be invalid.

The Supreme Court noted that "violation of public interest" is an exception to an arbitration agreement under the Uniform Arbitration Act (27-5-114, MCA). However, this exception "pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute." While Semitool seemed to challenge the validity of the arbitration agreement in its letter offering employment, the Court pointed out that wasn't at issue. Semitool had pursued arbitration specifically under the WDEA. In that case, the validity of the arbitration agreement can't be at issue, because the applicable section of the WDEA doesn't require an arbitration agreement prior to the dispute (39-2-914, MCA). Under that same statute, once the parties agreed to arbitrate, District Court no longer had jurisdiction. The Court reversed summary judgment.

Whether a staff attorney may even pursue an employment claim was a separate question, one the Court recognized as "an issue of first impression." A review of cases from other jurisdictions yielded conflicting results. The Court came down on the pattern of cases that allowed litigation to proceed. Semitool cited the "universal rule" that "clients may fire lawyers at any time, for any reason with or without cause." True, said the Court, when the lawyer is the "traditional" independent contractor to the client. When the client makes the lawyer an employee, it grants protections that don't apply to independent contractors, including the WDEA.

Semitool argued that applying the WDEA to attorneys' employment would be unconstitutional; the Montana Constitution gives the Supreme Court exclusive authority to regulate attorneys. True, said the Court, but this case wasn't about the conduct of the attorney, it was about the conduct of the employer. The WDEA legitimately applies to lawyers as employees or employers.

What it all came down to, in the end, was Rule 1.6 of the Code of Professional Conduct – confidentiality of information. While stressing the importance of confidentiality, the rule allows disclosure "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." The Court concluded that the plain language of the rule applies to an attorney's employment-related claim.

Parker-Bigback v. St. Labre School (2000) —**discrimination** *301 Mont. 16, 7 P.3d 361*

Although this discrimination case implicated marital status, the Supreme Court said it didn't invoke discrimination law: (1) the employee engaged in behavior at odds with the standards of her religious employer, (2) the employee engaged in behavior she had agreed to avoid when she signed on.

The Catholic Church operates St. Labre School on the Northern Cheyenne Reservation. Vera Parker-Bigback started teaching there in 1981. In 1988, she became the school's employee assistance counselor, and job she held until her discharge in 1993. The school said it was eliminating her job and setting up a personnel department. Parker-Bigback said she was fired for living with a man outside of marriage.

She filed a discrimination claim with the Human Rights Commission. The Commission dismissed her claim and issued a right-to-sue letter. Parker-Bigback then filed this lawsuit. District Court granted summary judgment to the school. The court said Parker-Bigback's claim interfered with the "free exercise" of religion protected by the first amendment. The Supreme Court affirmed: "This case is not about marital status or gender. It is about conduct which Bigback agreed to avoid when she signed her employment agreement with St. Labre School."

Justice Gray specially concurred. She would have reached the same result for a different reason: "Bigback's complaint fails to allege a *prima facie* case of marital status or sex discrimination ..." Judging the case on its merits, as the Court did, wasn't necessary.

Justice Leaphart dissented, joined by Justice Nelson. He pointed to two documents at issue – (1) the employment agreement and (2) the school's policy. The employment agreement said Parker-Bigback would avoid any "conduct or lifestyle which would be at variance or contrary to the policies of the School and the Diocese ... or the moral and religious teachings of the Roman Catholic Church." One policy of the school said it does not discriminate on the basis of marital status. "Thus," said Leaphart, "although the moral teachings of the Church may disapprove of a single person cohabiting with someone of the opposite sex, the Church waived that objection when it drafted a contract allowing Bigback to engage in a lifestyle so long as it was not a variance with the policies of the school." Leaphart would have reversed summary judgment.

Winslow v. Montana Rail Link, Inc. (2000) — ***collective bargaining agreement, WDEA, federal preemption, covenant, common law, damages, discovery*** *302 Mont. 289, 16 P.3d 992*

This case involved several areas of statutory and common law. The Supreme Court reversed summary judgment and remanded the case. A second appealed ensued in 2005 (see page 175).

After working for Montana Rail Link for eight years, Gary Winslow claimed a workplace injury. He underwent surgery for a hernia and returned to light duty. MRL discharged Winslow for dishonesty. The company said his hernia was a pre-existing condition over three years and his industrial-injury claim was fraudulent. Winslow filed a grievance, and MRL upheld the discharge. Winslow took it to arbitration under the collective bargaining agreement; the arbitration board also upheld his discharge. Winslow filed suit, alleging multiple counts: mismanagement, breach of the covenant of good faith and fair dealing, common-law wrongful discharge, and emotional distress. District Court granted summary judgment to MRL on all counts.

Mismanagement: Montana law at 39-2-703, MCA, says railroads are "liable for all damages sustained by an employee" for "mismanagement." District Court had ruled that the law covered only personal injuries. The Supreme Court found that interpretation "too restrictive." The law says "all damages," which encompass more than personal injuries.

District Court had ruled that Winslow's claim stemmed from discharge, so the WDEA would preempt 39-2-703, MCA. However, Winslow worked under a collective bargaining agreement, so the WDEA would not apply. Winslow's claim on mismanagement would require interpreting the agreement, so federal law (Railroad Labor Act) would preempt his state claim. The Supreme Court agreed that the WDEA didn't apply to Winslow's claim. That didn't restrict the issue to interpreting the collective bargaining agreement. The Court noted that Winslow's complaint made no reference to the agreement: "The plain language of the complaint simply invokes the mismanagement provisions of § 39-2-702(1), MCA, which are independent of the CBA." The Court reversed summary judgment.

Covenant of good faith and fair dealing: The Supreme Court affirmed summary judgment, relying on *Foster v. Albertson's Inc.* (see page 84). The implied covenant "arises from the underlying contract, which in *Foster*, as well as here, is the collective bargaining agreement." In that context, federal law preempted the state claim.

Common-law wrongful discharge: Again turning to *Foster*, the Court noted that a claim independent of the collective bargaining agreement could give rise to common-law wrongful discharge. District Court had read Winslow's claim as wedded to the CBA; the Supreme Court differed. His claim is wedded to the mismanagement issue, separate from the CBA. The Court reversed summary judgment.

Intentional infliction of emotional distress: District Court had dismissed this claim because it was linked to the wrongful discharge and mismanagement claims. The Supreme Court reversed.

Punitive damages: District Court had dismissed punitive damages because it had no jurisdiction over any of Winslow's claims. Having ruled this underlying premise incorrect, the Supreme Court reversed summary judgment on this claim.

Amended complaint: After MRL had moved for summary judgment in District Court, Winslow tried to amend his complaint to add a new factual basis for punitive damages. District Court ruled that he couldn't change his legal theory after MRL filed its motion. The Supreme Court found that Winslow's proposed amendment would have no bearing on MRL's preemption argument. The Court reversed denying the amended complaint.

Discovery: Winslow asked the Supreme Court to intervene in a discovery dispute between the parties. The Court declined to do so, as the issue was "not ripe for appeal." District Court had not ruled on discovery because it believed it lacked jurisdiction. With that issue straightened out, said the Supreme Court, it would be up to District Court to address discovery.

Justice Nelson dissented on the last issue: "I would address and decide the discovery question presented." He noted that Winslow had been timely and diligent in attempting discovery, while "MRL opposed this discovery in nearly every way possible." The result was five years of delay. It would be appropriate, in light of Winslow's constitutional right to a speedy remedy, to suspend the Rules of Appellate Procedure and decide the issue. Justices Hunt and Trieweiler agreed with Nelson.

Hobbs v. City of Thompson Falls (2000) —***WDEA, probation, statute*** *303 Mont. 140, 15 P.3d 418*

Two statutes figured in this case – the Wrongful Discharge from Employment Act and the local government statute for police officers. The Supreme Court read them together to resolve the issue of probation.

Clarence Hobbs went to work as a police officer in Thompson Falls in November 1996. The City's policy put him on a six-month probation. State law for police officers provided for "a probationary term of not more than one year" (7-32-4113, MCA). The same law said the council must consider confirming employment within 30 days of the end of probation. Hobbs was still employed at his one-year anniversary date. A couple weeks later, though, the City Council discharged him without cause, saying he was still on probation.

Hobbs filed a claim under the WDEA, alleging he had completed probation and his discharge was without good cause. The City responded that Hobbs was still on probation until the City Council confirmed his appointment. In denying the appointment, the Council didn't need to have good cause. District Court granted summary judgment to the City, and Hobbs appealed.

In deciding Hobbs's appeal, the Supreme Court did not address the City's policy of six months probation. Rather, it focused on the statutory provision of "not more than one year." When Hobbs completed one year, he came under the protection of the WDEA. He would not have become a member of the police force until confirmed by the City Council. "However, confirmation [could not] be denied following the satisfactory completion of the probationary period without good cause." The Court reversed summary judgment.

Young v. Community Hospital and Nursing Home of Anaconda (2001) —***WDEA, arbitration, attorney-client*** *2001 MT 32N (unpublished)*

Arbitration is final and binding. If the plaintiff didn't know that, it's a problem between her and her lawyer.

Merrie Young ran Human Resources for Community Hospital. When the hospital lost its outside counsel for labor relations, it decided to expand HR to include labor relations. Because Young was not qualified in labor relations, the hospital eliminated her job and offered a severance package. Young didn't accept or reject the offer; instead, she went on sick leave, citing stress. After a few months, her sick leave ran out, so she switched to vacation leave. Meanwhile, the hospital offered her another job at the same rate of pay. She didn't accept or reject that, either, but stayed on leave until it ran out. The hospital kept her on unpaid leave another four months until she told them she was rejecting the other job. The hospital considered her departure a voluntary termination.

Young filed a wrongful discharge suit. The parties agreed to arbitrate, and the court action was dismissed. The arbitrator found in favor of the hospital. Young filed an application in court to vacate the arbitration award. She said nobody told her (especially her attorney) that arbitration would be final and binding. District Court denied her application.

The Supreme Court affirmed: "Young has not cited ... any statutory basis for vacating the award made by the arbitrator. Moreover, it is clear from the record that none of the statutorily enumerated grounds ex-

ists." Young's complaint that her attorney didn't tell her the binding nature of arbitration "is a matter between the two of them."

Andrews v. Plum Creek Manufacturing, LP. (2001) —**WDEA, good cause** *305 Mont. 194, 27 P.3d 426*

Where District Court had found good cause for discharge as a matter of law, the Supreme Court said a lot of questions of fact remained unanswered. The Court reversed summary judgment.

Kim Andrews worked as "invoice production clerk" in the office of Plum Creek's Evergreen mill. Her training for the job had been minimal. She received no performance evaluations over five years. She had received no disciplinary warnings. An internal audit revealed discrepancies between deposit slips and other financial documents. As a result, the company removed Andrews from her job and put her on "investigatory suspension." The general manager offered to let her keep her seniority and take on any of four other jobs in the mill. He said she was removed from the clerk position for poor performance. Andrews rejected the other jobs; instead, she quit and filed this lawsuit.

After District Court granted summary judgment to Plum Creek, Andrews appealed. She disputed the finding of good cause as a matter of law. Her evidence showed that "Plum Creek provided no supervision, no job evaluations, no written job standards and no accounting procedures." When she had agreed there were problems with record-keeping, she was talking about the system, not her performance. Plum Creek argued that "failure to satisfactorily perform job duties constitutes good cause to discharge an employee, regardless of who is at fault for that failure." Andrews's evidence didn't show she did a good job; it only provided excuses for her failure to perform.

"In this case," concluded the Court, "there was conflicting evidence regarding the existence of an admission of failure to perform job duties and regarding satisfactory performance of job duties." The Court reversed summary judgment and remanded the case.

Wolny v. City of Bozeman (2001) —**due process** *306 Mont. 166, 30 P.3d 1085*

This due-process review of a police officer's discharge dealt with several issues. In addition to the incident that started this case, it also focused on his insubordination during the investigation. The Supreme Court affirmed the discharge.

Early one morning in downtown Bozeman, police officers responded to a possible assault. Dave Wolny was among them. While they were on the scene, a car accident occurred nearby. As Wolny approached that scene, a shouting bicyclist rode toward him. In the encounter between officer and bicycle, the rider hit the ground and suffered a serious head injury. The incident led to an investigation on improper use of force. As the investigation progressed, Wolny's story changed quite a bit. No criminal charges ensued, but the case went to the police department's review board on use of force.

After the review, the police chief informed Wolny in writing that disciplinary action was under consideration, possibly including discharge. The chief included the investigation report and review board report. The department held a disciplinary hearing, and Wolny produced a report and diagram. After the hearing, the chief wrote to Wolny that additional charges were pending because of false information in the diagram. At a second disciplinary hearing, Wolny refused to answer any questions. The chief then wrote a third letter, ordering Wolny to appear in his office and answer some questions. Failure to do so would amount to insubordination, the chief wrote. Wolny appeared with written answers, but refused to answer questions orally.

A week after the last meeting, the chief discharged Wolny. After a four-day hearing, the Police Commission upheld the discharge. Wolny's petition for judicial review in District Court yielded the same result. so Wolny appealed to the Supreme Court. The Court examined five issues in his appeal.

Inadequate notice: Wolny's discharge stemmed, in part, from his "false or misleading statements" during the investigation. Wolny argued that the City provided inadequate notice of what those statements were, so he couldn't defend himself. However, the chief's first letter to Wolny cited several examples of such statements, and Wolny responded with detailed explanations. In addition, the termination letter referred to prior documentation and set forth the reasons for discharge. The Court affirmed that notice was adequate.

Testimony of one witness: Wolny contended that the Policy Commission discounted the deposition of a witness whose testimony was most favorable to him. The Court found that "the Commission did, in fact, give weight" to the testimony, and it "was not entirely helpful for Wolny's case." The Court affirmed that the Commission hadn't discounted the testimony.

Insubordination: Wolny argued there was insufficient evidence to support the finding of insubordination. He said the chief didn't make it clear that failing to orally answer questions would violate the chief's order. The Court stressed, "Employers have the right to compel their employees to answer questions which reasonably relate to the employee's fitness to perform duties or relate to their job performance." The chief's letter was clear about this requirement and the consequences of refusal. The Court affirmed.

Disciplinary history of other officers: The Police Commission had excluded any evidence of previous discipline to other police officers. Wolny argued that such evidence was relevant as to whether his discharge was too severe. Based on precedent in *Matter of Raynes* (see page 17), the Court said, "Evidence of other disciplinary actions is not relevant ..." The Court affirmed.

Progressive discipline: Wolny challenged whether his discharge complied with the City's progressive disciplinary policy. He contended that the City did not offer his personnel file as evidence or prove that it followed the policy. However, said the Court, "Wolny was not being terminated for his past actions," but for his actions in one incident. At the Commission hearing, the policy was entered into the record and Wolny himself testified about prior discipline he had received. The Court affirmed.

Justice Nelson specially concurred. He raised a point on the fourth issue – disciplinary history of other officers. Nelson wrote that the precedent case, *Raynes*, lacked any authority regarding that conclusion. "I do not agree with the broad and imprecise statement in *Raynes* that 'past conduct or action is never admissible as relevant in a case regarding a specific charge.'" Justices Cotter, Leaphart, and Regnier joined with Nelson.

Firestone v. Oasis Telecommunications, Data and Records, Inc. (2001) —**contract, arbitration**
307 Mont. 469, 38 P.3d 148

In this case, timing was everything. The Supreme Court affirmed that the employer needed to follow its own contract in arranging arbitration. However, the Court wasn't unanimous in the way it viewed the situation.

Lowanna Firestone went to work for Oasis Telecommunications as an administrative assistant in July 1999. At the time, she and Oasis signed a written agreement; it contained a section on "dispute resolution." The section provided that the parties would try to negotiate an agreement to any dispute. If that didn't work within 30 days, either party could give notice on the desire to arbitrate the dispute. The agreement provided 30 days to respond to the notice.

The next year, this sequence of events took place:

- May 8 – Oasis discharged Firestone
- May 18 – Firestone demanded arbitration
- May 23 – Firestone asked to use a "neutral arbitrator," rather than filing with the American Arbi-

tration Association (AAA), as specified in the contract

- June 5 – Oasis responded that was receptive to the idea of using a neutral arbitrator
- June 7 – Firestone sent a list of possible arbitrators and asked that Oasis state its preference within ten days
- July 7 – with no response from Oasis, Firestone filed a breach-of-contract suit in federal court; the federal court dismissed the case for lack of jurisdiction
- August 1 – Firestone filed the same suit in District Court
- August 11 – Oasis responded to Firestone's June 7 letter regarding possible arbitrators
- August 25 – Oasis filed a motion in District Court to compel arbitration.
-

District Court denied the motion, leading to this appeal. Firestone cross-appealed because District Court had denied her request for attorney fees and costs.

Oasis argued first that Firestone failed to comply with the three-step AAA procedure required by the contract. The Court said Oasis waived this requirement when it "not only failed to respond but gave Firestone every reason to believe that compliance with the AAA three-step process would be unnecessary." However, there was no express waiver from Oasis for arbitration altogether, so the bigger issue was "whether Oasis's actions constituted an implied waiver ..."

The Court concluded that Firestone's letter of May 18 started the 30-day period in the contract. Oasis didn't respond until 84 days had passed. The Court called this delay a "perceived indifference to Firestone's request" that worked against Oasis's asserted right to compel arbitration. The delay left Firestone with no alternative other than litigation, which "prejudiced" her situation. The Court affirmed denial of arbitration.

Firestone has requested Oasis pay her attorney fees and costs. The Court recognized District Court's "broad discretion" in this area. Both parties acknowledged that Oasis had drafted a response on June 13, but failed to deliver it due to "inadvertence and mistake." This didn't amount to frivolous or abusive litigation, so it didn't merit sanctions.

Justice Rice concurred, but reasoned that Oasis's contract didn't require complying with AAA requirements. So, there was no need to find, as the majority did, that Oasis have waived the requirement. Justice Nelson joined with Justice Rice.

Justice Gray dissented, joined by Justice Leaphart. Justice Gray disagreed "that Oasis impliedly waived its right to compel arbitration." Gray wrote that Firestone failed to comply with the requirements for seeking arbitration, so "Oasis had no duty to respond to an improper demand for arbitration." Gray also wrote that Oasis didn't act inconsistently with the right to arbitrate, nor did the situation prejudice Firestone's cause.

Offerdahl v. State of Montana, Department of Natural Resources and Conservation (2002) — WDEA, grievance *308 Mont. 94, 43 P.3d 275*

Once again, timing was everything. When the discharged employee filed his grievance late, the employer denied the grievance. The plaintiff's subsequent lawsuit was barred on the grounds of 39-2-911, MCA.

Acting on complaints and its investigation, DNRC scheduled a "pre-termination meeting" with Russ Offerdahl for September 15, 1997. He didn't attend. DNRC sent a letter on that date to inform him he was discharged. The letter included information about (1) his right to file a grievance and (2) a copy of the grievance policy. The department offered Offerdahl another chance to respond in writing or to meet, set for September 26. On September 23, it received a letter from him that said he wouldn't attend a meeting and that he planned "to follow the grievance procedure as directed by the Department in their discharge letter of September 15."

The grievance procedure allowed 15 working days from the "grievable event" to file a grievance. With September 15 as the date of the event, the deadline was October 6. Offerdahl mailed his written grievance on October 7. On October 15, DNRC let him know that his grievance was not timely filed and, therefore, denied. Offerdahl then filed this wrongful discharge action. DNRC succeeded in getting summary judgment; Offerdahl appealed.

The statute of limitations in the Wrongful Discharge from Employment Act requires a discharged employee to first exhaust the employer's "internal procedures" before filing a lawsuit. "The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part" (39-2-911(2), MCA). In his appeal, Offerdahl argued that he had initiated a grievance. He said he spoke on the phone to "a Department employee" on September 18 and said he planned to file.

The Supreme Court found that this action didn't comply with the grievance procedure. Even so, contended Offerdahl, his letter (received six days after the discharge) presented a formal filing. Wrong, said the Court, it also fell short of requirements. Still, said Offerdahl, DNRC acknowledged his grievance when it offered a "hearing" for September 26. Nothing in the record supported that theory.

Well then, Offerdahl contended, the "grievable event" occurred September 17 when he received the discharge letter. "If receipt of the written notice were the grievable event," said the Court, "Offerdahl would be correct." But the event was Offerdahl's discharge; his written grievance even cited September 15 as the date of the grievable event. In affirming summary judgment, the Court concluded, "Failure to exhaust administrative procedures is a complete bar to pursuing a claim under the Wrongful Discharge from Employment Act."

Casiano v. Greenway Enterprises, Inc. (2002) —***WDEA, grievance, procedure*** *309 Mont. 358, 47 P.3d 432*

The Supreme Court again showed its reluctance to overturn a jury's decision. Here, the Court affirmed the decision and award in favor of the plaintiff. The Court also restated the necessity of the employer providing a copy of its grievance procedure to the discharged employee.

Tony Casiano worked construction for Greenway in Helena for about nine months. He completed the six-month probation about the time he started working on building the new Surgi-Center for the local hospital. While Casiano was on that project, his boss fired him for insubordination. The company vice-president told Casiano about Greenway's grievance procedure but didn't give him a copy. Casiano filed suit, alleging retaliation for filing a workers' compensation claim, retaliation for refusing to violate public policy, and discharge without good cause.

The case went to jury trial. The jury returned two verdicts: (1) Greenway did not retaliate for the workers' comp claim, and (2) Greenway did fire Casiano without good cause and it violated the provisions of its own personnel policy. The jury awarded Casiano $40,908. Greenway moved for a judgment as a matter of law or a new trial, arguing that the facts didn't support the award. District Court denied the motion.

Greenway's appeal focused on three issues. First, it contended that Casiano hadn't used the company's grievance procedure, but District Court had disallowed the defense allowed under the law (39-2-111, MCA). Casiano responded that he never received a written copy of the procedure, as required by the same law. As in *Eadus v. Wheatland Memorial Hospital* (see page 127), the employer had furnished an employee handbook at some time during employment, but not within seven days of discharge. And as in *Eadus*, the Supreme Court ruled no copy, no defense.

Second, in District Court Casiano had used a peremptory challenge on one prospective juror. Greenway then moved to discharge the jury because Casiano's challenge discriminated on the basis of "social condition." The prospective juror was a business owner. Relying on *Batson v. Kentucky* (476 U.S. 79, 106 S.Ct.

1712), a 1986 US Supreme Court decision, discrimination on a racial group or suspect class denies equal protection to the party opposing the challenge. The Court recognized the issue as "a matter of first impression," but refused to address the merits. A "*Batson* challenge" must occur before the jury is impaneled. Greenway didn't do that, so its motion was untimely.

Third, Greenway disputed the damages, arguing that Casiano would have been laid off at the end of the Surgi-Center project anyway. Casiano pointed out that Greenway had employed him doing shop work during the prior winter. The Court concluded "there was not a complete absence of evidence to support the jury's verdict." As a result, the award of damages stood.

McGinnis v. City of East Helena and Moore (2002) —WDEA, tort, discrimination
2002 MT 254N (unpublished)

In this non-cite opinion, the Supreme Court affirmed summary judgment for the City on a number of counts.

Ron McGinnis was Police Chief in East Helena for 13 years. During that time, he suffered a number of physical ailments. One of them resulted in knee-replacement surgery. McGinnis had difficulty recovering from the surgery and took several months of medical leave. McGinnis told the City he couldn't perform the full duties of his job. He asked to forego patrol duty and do only administrative work. This would have involved hiring another officer to cover patrol. The City Council declined his request and discharged McGinnis.

When McGinnis threatened to sue, the City Council appointed an ad hoc committee to try and find an accommodation for him. Neither McGinnis nor his attorney attended the committee's meeting. The committee determined that McGinnis couldn't perform the essential functions of the job and that hiring another officer wasn't a reasonable accommodation.

McGinnis then followed through on his threat, filing a claim with multiple counts: violation of Title VII, violation of ADA, negligent and intentional infliction of emotional distress, statutory relief applying to police officers, breach of contract, and wrongful discharge. District Court granted summary judgment to the City, and McGinnis appealed.

The Supreme Court didn't examine McGinnis's contract claim, as he had failed to brief it. The wrongful discharge claim didn't hold any water, since McGinnis himself had said he couldn't do the job. The Wrongful Discharge from Employment Act exempted his claims for negligent and intentional infliction of emotional distress, unless the distress arose separately from his discharge. McGinnis cited ongoing "harassment" by Mayor Larry Moore as a source of distress. Even presuming McGinnis's allegations to be true, the Court did not find Moore's conduct severe: "while Moore may have behaved in a manner inconsiderate and unkind, we are not persuaded that he created severe distress that was the source of McGinnis's psychiatric condition."

McGinnis argued he was denied an appeal before the City's Police Commission. He acknowledged he had failed to file a written appeal of his termination with the Commission. He testified that Moore had told him an appeal would be useless. He argued that this statement relieved him of the duty to file a written appeal. No dice, said the Court. It was his statutory right, and it was up to McGinnis (or his attorney) to be aware of and to invoke that right. The Court affirmed summary judgment.

Dias v. Healthy Mothers, Healthy Babies, Inc. (2002) —WDEA, wages, attorney fees
313 Mont. 172, 60 P.3d 986

Mentioning liability insurance during jury selection didn't taint the process in this case. The plaintiff recovered damages for wrongful discharge, lost wages, and attorney fees in the wage action.

This joint action by Marcia Dias and Amy Palmer stemmed from the discharge of five employees from Health Mothers, Healthy Babies in 1994. (See *Old Elk et al. v. Healthy Mothers, Healthy Babies*, page 159.) Dias and Palmer sought damages for wrongful discharge. They also pursued wage and hour claims for unpaid wages. As the case went to trial, a prospective juror said she was worried a verdict against HMHB might damage its programs or expose volunteers to liability. While questioning the person, the plaintiffs' attorney mentioned "insurance." Defendant's counsel objected. The woman was excluded from the jury, and the trial went ahead.

The trial ended with the jury returning a verdict for Dias and Palmer. Palmer's case then ended; she received an award, but it wasn't the subject of this appeal. The jury awarded Dias $91,595 for wrongful discharge and $4,380 on a wage and hour claim. District Court tacked on $6,659 for Dias's attorney fees on the wage and hour claim. HMHB moved for a new trial but failed to get it.

HMHB appealed, arguing that the mention of insurance during jury selection tainted the whole process. Rule of Evidence 411 excludes evidence whether a person had liability insurance. Did mentioning the word insurance during jury selection violate the rule? The Supreme Court said it was a matter for District Court's discretion. However, the idea "that the mere mention of insurance can move a jury to ignore the law and award a windfall ... is an ancient myth unsupported by any empirical data ..." To the contrary, a jury might think lack of insurance exposes an organization to financial ruin. Anyway, the word was mentioned only once and didn't violate Rule 411.

HMHB also challenged attorney fees for the wage and hour claim. The Court noted that the law for such claims requires payment of all costs, including attorney fees (39-3-214, MCA). The only action the Court required on remand was to determine additional fees owed to Dias's attorney because of this appeal.

Hunter v. City of Great Falls (2002) — ***WDEA, probation, §1983*** *313 Mont. 231, 61 P.3d 764*

Can a city extend a firefighter's probationary period when statute provides for a six-month probation? By the wording of the statute, the Supreme Court said yes. The finding precluded other claims in this suit.

Kelly Hunter started as a firefighter with the Great Falls Fire Department on March 1, 1996. Under statute, his initial appointment encompassed a six-month probationary term. After five months, the Department extended his probationary period, with review month by month. Hunter didn't dispute this extension. After a couple months, his lack of progress led to his termination. He filed a grievance through the Firefighters Union. The City denied the grievance because a firefighter doesn't become a member of the union until successfully completing probation.

Hunter then filed this action, invoking the Wrongful Discharge from Employment Act and 42 U.S.C. § 1983. He alleged that he had completed probation, so he was entitled to relief under the Act and to due process as a civil right under § 1983. District Court granted summary judgment to the City on both claims, and Hunter appealed.

Hunter contended that the Supreme Court's decision in *Hobbs v. City of Thompson Falls* (see page 152) ruled out extending a probationary period. Wrong, said the Court; he overlooked a "crucial difference between the statutes addressing probationary periods for police officers and firefighters." In *Hobbs*, the police statute sets probation at "not more than 1 year." The firefighter statute says appoint "shall first be made for a probationary term of 6 months" (7-33-4122, MCA). The Court noted, "Nothing in the statute limits a firefighter's probationary term to six months."

Hunter argued that this reading gave the City too much discretion to set probation arbitrarily. The Court pointed out that the City's own policy required "at least six (6) months experience," plus a written recommendation and a minimum score of 75% on a written test. "These discrete requirements ...," said the

Court, "disprove Hunter's suggestion that the extension of his probationary period was a matter of pure discretion." The City "met its burden of showing that a probationary period was in effect at the time of Hunter's discharge." (See *Whidden v. John S. Nerison*, page 143.) Because Hunter was on probation, his claims under the WDEA and §1983 evaporated. The Court affirmed summary judgment.

Justice Rice concurred. However, he said, the statute regarding firefighters shouldn't have been an issue. "The City of Great Falls has a charter form of government," Rice wrote, and its self-governing provisions superseded statutory provisions. The only thing to examine, he said, would be the City's policy, and Hunter hadn't satisfied its terms of probation.

Justice Trieweiler dissented, joined by Justice Regnier. Trieweiler said the Court's decision "adds language to § 7-33-4122, MCA, which is not there and engages in a game of semantics to deny Kelly Hunter his day in court." The plain language of the law, argued Trieweiler, is six months – no more, no less. "If employers are allowed to extend the probationary period beyond what is agreed to with the employee at the outset of the employment or beyond what is permitted by statute, then the statutory scheme is meaningless and the protective purpose of the Wrongful Discharge From Employment Act can be circumvented at will."

Old Elk, Goodleft, and Zimmer v. Healthy Mothers, Healthy Babies, Inc. (2003) — **tort, release**
316 Mont. 320, 73 P.3d 795

When departing employees signed releases promising not to sue, their subsequent lawsuit was dismissed. They also had to pay attorney fees and costs to the former employer.

This lawsuit stemmed from the same "group discharge" in *Dias v. Healthy Mothers, Healthy Babies* (see page 157). In a key difference, these plaintiffs signed "Separation and Release Agreements" with HMHB soon after the discharge. The agreements released HMHB from a broad range of employment-related claims, and the former employees promised "never to file a lawsuit asserting any claims that are released ..." "Never" lasted about 10 months, then Old Elk, Goodleft, and Zimmer filed this action.

By the time they got things straight with a second amended complaint, the plaintiffs were asserting claims for wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, interference with contract, and tortious conduct. HMHB brought in the signed releases and moved for summary judgment. District Court granted the motion and ordered the plaintiffs to pay attorney fees and costs to HMHB. When Good Elk and company failed to get the judgment set aside, they appealed.

On appeal, the plaintiffs argued that wage and hour law barred a contract that circumvented the law for such claims. They also said the agreements "were not supported by sufficient consideration." However, the plaintiffs had no evidence to support these arguments, other than a couple vague affidavits. The Supreme Court affirmed summary judgment. The Court refused to consider plaintiffs' contention that HMHB acted in bad faith, since they were raising the issue for the first time on appeal. Finally, the Court rejected plaintiffs' claims for attorney fees under wage and hour law; because their wage and hour action had fallen flat, they weren't entitled to attorney fees.

Vitullo v. International Brotherhood of Electrical Workers, Local 206 (2003) — *WDEA, preemption*
317 Mont. 142, 75 P.3d 1250

In this case, federal law – the Labor Management Reporting and Disclosure Act – preempted the Wrongful Discharge Act.

Charles Vitullo worked for Local 206 of the IBEW as assistant business manager and organizer from 1992 until April 1999. About a month before his discharge, Vitullo told his boss, the IBEW business manager, that Vitullo had been asked to run for election to replace the business manager. His boss said if Vitullo

decided to run, it would be a conflict of interest and Vitullo would lose his job. Vitullo went ahead and accepted the nomination to run, so he got fired.

Vitullo filed a complaint with the National Labor Relations Board, which said he didn't have a case. Vitullo then filed this lawsuit, alleging wrongful discharge under Montana's Wrongful Discharge from Employment Act. District Court ruled that the IBEW's constitution controlled; it gave the business manager hiring and firing authority. It also said that employees couldn't work in conflict with the business manager. Under this construct, the federal law preempted state law. Vitullo appealed.

The Supreme Court noted that the LMRDA and the IBEW constitution were similar: they both gave a lot of authority to the business manager "to appoint and discharge assistants at any time." How might federal law preempt state law? The Court described three types: (1) express preemption – Congress includes a preemption clause; (2) field preemption – an implied result when federal law is so comprehensive that it "occupies the field" of law, leaving no room for state regulation; (3) conflict preemption – where state law obstructs the full purpose and objective of Congressional action.

In analyzing the case, the Court ruled out the first two types. However, it did recognized a conflict preemption: "a state law which interferes with the longstanding practice of union patronage, established in the union's democratically enacted constitution, is not only contrary to the overall purpose and objective of the LMRDA as declared by the United States Supreme Court, but is in direct conflict with the democratic process that Congress sought to protect." The Court affirmed summary judgment.

Bourdelais v. Semitool (2003) — ***WDEA, good cause*** *2003 MT 235N (unpublished)*

In this non-cite opinion, the Supreme Court affirmed summary judgment for Semitool. The company had fired Bourdelais for refusing to follow his assigned work schedule.

Bruce Bourdelais started at Semitool in 1992. He worked a variety of jobs, and by 1996, he was a lab tech. He worked four 10-hour shifts each week, with some occasional overtime on Friday. In 1999, Bourdelais got a new boss, Paola Cagnoni, who assigned him to work five 8-hour shifts, Monday through Friday. However, Bourdelais refused to follow the new schedule. Given this problem and other conflicts with Cagnoni, Semitool transferred Bourdelais to a different area of the plant. He then began to harass Cagnoni, leaving inappropriate items on her desk. After several incidents of this behavior, Bourdelais got fired.

The ensuing litigation didn't get too complex. Semitool moved for summary judgment. Bourdelais moved to file discovery. District Court denied his motion and granted Semitool's. Bourdelais's appeal didn't get far, either. The Supreme Court refused to consider the denial of his motion for discovery because he failed to raise the issue in his notice of appeal. The Court did consider Bourdelais's challenge to summary judgment, but not much. Bourdelais said his schedule problems stemmed from miscommunication, but the Court didn't buy it: "it is undisputed that was repeatedly informed (both orally and in writing) of his work schedule and chose not to adhere to it." That was such good cause for discharge that the Court said it didn't even need to consider the harassment issue. Affirmed.

Justice Nelson dissented in part, joined by Justices Cotter and Rice. Nelson wrote that District Court's denial of Bourdelais's discovery motion was an "interlocutory order" and not appealable. However, Appellate Procedure Rule 2(a) allows review of these orders as part of the review of summary judgment. Nelson would have looked at the merits of Bourdelais's argument.

LaFournaise v. Montana Developmental Center (2003) — ***WDEA, exemption, collective bargaining agreement*** *317 Mont. 283, 77 P.3d 202*

The Wrongful Discharge from Employment Act precludes a union employee from bringing an action, even if her union won't represent her under the collective bargaining agreement.

After Montana Developmental Center discharged Margery LaFournaise from her job as LPN, she filed a human rights complaint and a grievance. Nothing came of either. After the grievance went through several steps, the union – AFSCME Local 971 – dropped it. The union told LaFournaise she'd have to go to court if she wanted to pursue the issue any further. She did. MDC moved for summary judgment, pointing out that the WDEA exempts employees covered by a collective bargaining agreement (39-2-912, MCA). District Court granted MDC's motion.

On appeal, LaFournaise first argued that the collective bargaining agreement was a "contract of adhesion," in which one party dictates unreasonable terms to a weaker party. When the union member is powerless to move her grievance to arbitration, the contract's mandate for arbitration cuts off any remedy. The Supreme Court didn't buy it. LaFournaise wasn't a party to the contract: it arose between the union and MDC. And there was no evidence that either of those parties dictated terms to the other.

LaFournaise's other argument attacked the WDEA as unconstitutional. By precluding her wrongful discharge action, she contended, the law deprived her of access to the courts for full legal redress. The Court gave this approach short shrift: "LaFournaise has produced nothing to overcome the presumption that § 39-2-912(2), MCA, is constitutional." Besides, said the Court, "she is not necessarily left without a remedy or access to the courts." She could sue the union.

MacKay and Orcutt v. State of Montana, Board of Regents, and Montana University System (2003)
— collective bargaining agreement, tort, covenant *317 Mont. 467, 79 P.3d 236*

In a four – three decision, a divided Supreme Court ruled that the grievance procedure provided the exclusive remedy for disputes under a collective bargaining agreement. Employees must exhaust the process before pursuing claims in court.

This case arose from difficulties between nursing instructors and a student at the College of Technology in Great Falls (MSU-GF). Connie MacKay and Elissa Orcutt were the instructors. Scott Dion was the student. Because Dion twice failed Orcutt's practica, he didn't graduate. Dion began a campaign of threats and intimidation, and both MacKay and Orcutt got restraining orders against him. The women found no support from the union or administration to protect them from Dion. Meanwhile, Dion filed a gender discrimination complaint with the Human Rights Bureau and prevailed. Before long, both MacKay and Orcutt resigned.

The two women filed suit, advancing four claims: (1) negligence for failing to provide a safe working environment, (2) common-law constructive discharge, (3) statutory constructive discharge, and (4) breach of covenant of good faith and fair dealing. MSU-GF moved for summary judgment on the grounds that MacKay and Orcutt failed to use the grievance procedure in their collective bargaining agreement (CBA). District Court denied the motion. After a jury trial, the court directed verdicts on counts 1, 2, and 4. Regarding Count 3, the court said the Wrongful Discharge from Employment Act didn't apply. MSU-GF appealed.

The Supreme Court looked solely at the denial of the motion for summary judgment. MSU-GF said it allowed MacKay and Orcutt to sidestep their remedy under the collective bargaining agreement. MacKay and Orcutt advanced four responses: (a) they weren't union members, so didn't have to follow the grievance procedure, (b) the grievance procedure wasn't mandatory, (c) the contract didn't state a clear waiver of the right to a jury trial, and (d) the union didn't help them with Dion when they asked.

The Court recognized that MacKay and Orcutt didn't belong to the union. However, their jobs were part of the collective bargaining unit, and they paid a representation fee to the union (rather than dues). It was clear, said the Court, that the CBA covered them. The CBA provided for a "safe place to work," so the contract also covered the issues here. MacKay and Orcutt pointed out that the CBA said they "may file a

formal written grievance." The use of "may," they argued, left it up to them whether they would grieve or litigate an issue. The Court disagreed, finding it clear that the CBA made the grievance procedure mandatory. Using the word "may" gives the employee the option of grieving or not grieving, but not the option of suing instead of grieving.

Still, said MacKay and Orcutt, the CBA wasn't clear that they waived their right to sue. The Court pointed out well established precedent: if the CBA covers the issue at dispute, the employee must exhaust the grievance procedure. (See *Brinkman v. State*, page 24). But the union didn't help us, countered MacKay and Orcutt. That doesn't excuse them from the grievance procedure, said the Court. "Neither approval nor participation is required from the union"; the duty to follow the grievance procedure rests with the employee. The Court reversed the verdicts and remanded the case for dismissal.

Justice Leaphart, joined by Justices Cotter and Regnier, dissented. He wrote that comparing the use of "may" in the CBA of *Brinkman* to this case was misleading: "In the present CBA, 'may' refers to the filing of a grievance; whereas the 'may' in *Brinkman* refers to the employer's discharge of the employee." The dissent would leave it to the employee to choose whether to grieve or to sue.

Justice Cotter added a further dissent, joined by Regnier. Cotter noted that 39-31-306(5), MCA, "clearly and unequivocally gives any aggrieved party with a claim against a school a right of election – grievance or judicial remedy." Since MSU-GF "is undeniably 'a school,' MacKay and Orcutt exercised their statutory right to pursue their complaint in a court of law." Justice Rice entered a concurring opinion to respond to Cotter. As a former legislator who helped pass 39-31-306(5), MCA, Rice contended that the reference to "school" meant only local schools – elementary and high schools. It would not include the university system.

Hubner v. Cutthroat Communications, Inc. (2003) — ***WDEA, arbitration*** *318 Mont. 421, 80 P.3d 1256*

Where an employee handbook specifically stated it was not a contract, its arbitration provision was not binding on the employee.

Elizabeth Hubner worked one year for Cutthroat Communications. She signed an employee handbook that contained a provision that "any controversies arising out of or in any way relating to your employment ... are subject to binding arbitration." After her discharge, Hubner filed a wrongful discharge lawsuit. Cutthroat moved District Court to require Hubner to arbitrate. The court denied the motion, and Cutthroat appealed.

Hubner pointed out the ambiguity in the handbook. In the Introduction, it said, "[This] is not a contract of employment." In the arbitration section, it referred to "this contract." In the acknowledgement section that Hubner signed, it said "the Employee Handbook shall not constitute a contract of employment ..." The Supreme Court noted that any ambiguity works against the drafter, Cutthroat. Thus, "the parties did not make an agreement to arbitrate because Hubner did not consent to arbitrate by virtue of the ambiguous language." The Court affirmed and remanded the case "for further proceedings."

Losleben v. Oppedahl, Bryson, Capp, and State of Montana (2004) — ***WDEA, § 1983, immunity*** *319 Mont. 269, 83 P.3d 1271*

The "class of one" interpretation under 42 U.S.C. 1983 was not clearly settled at the time of discharge. Thus, individual defendants enjoyed qualified immunity.

For 16 years, Rick Losleben worked for the Department of Justice in Gambling Control. As an investigator, he allegedly violated an operator's (Tena Hunt) constitutional right to counsel: he kept questioning her after she requested an attorney. The State discharged Losleben for this incident. He filed suit, alleging

wrongful discharge and violation of constitutional rights. The latter claim fell under § 1983; Losleben claimed protection as a "class of one" who had been subjected to "vindictive and spiteful" treatment. Both sides moved for partial summary judgment. Losleben wanted a ruling that he hadn't violated Hunt's rights. The State wanted dismissal of the § 1983 claim, arguing that Oppedahl, Bryson, and Capp were immune. District Court denied Losleben's and granted the State's motions.

Losleben appealed, with the focus of his § 1983 claim only against Capp, his direct supervisor. (Losleben had dropped Oppedahl and Bryson before District Court's decision.) Losleben cited a 2000 decision of the US Supreme Court, *Village of Willowbrook v. Olech* (528 U.S. 562, 120 S.Ct. 1073). In that case, the Court held that an equal protection claim may be brought by a "class of one" who is singled out for unfair treatment, even though the person wasn't part of a traditional protected class. Given that Losleben's discharge occurred in 1999, the question facing Montana's Supreme Court was whether the "class of one" was clearly established at the time. If not, Capp would enjoy qualified immunity from the § 1983 claim. (See *Boreen v. Christensen*, page 130.) The Court affirmed qualified immunity for Capp and affirmed dismissal of the claim against him.

Losleben also appealed District Court's decision on whether he violated Hunt's constitutional right. The Court said the decision hadn't been "a final judgment," so it "was not appealable." The Court remanded that case for consideration of Losleben's wrongful discharge claim.

Ritchie v. Town of Ennis and Hernandez (2004) — ***WDEA, probation, statute, arbitration***
320 Mont. 94, 86 P.3d 24

The Wrongful Discharge from Employment Act did not supersede a statute governing police officers' probation. That statute gave the mayor broad discretion. When no offer to arbitrate existed, the party that prevailed in court wasn't entitled to attorney fees and costs under 39-2-915, MCA, of the WDEA.

Jerry Ritchie started as town marshall for the Town of Ennis in August 2000, entering with six months' probation. In January 2001, he was arrested for stalking a former girlfriend. This led Ennis's mayor to fire him. Ritchie filed a wrongful discharge suit, alleging retaliation or refusing to violated public policy and violation of written personnel policies. The Town sought summary judgment, arguing that the provisions of 7-32-4113, MCA, supplanted the WDEA and gave the mayor broad discretion to fire a probationary officer. District Court granted the motion, and Ritchie appealed. The Town also appealed the denial of attorney fees and costs.

District Court had ruled under the WDEA that, because Ritchie was on probation, he had no rights to a hearing on the public policy or personnel policy issues. On appeal, Ritchie argued that probation applies only to the "good cause" element of 39-2-904, MCA; the other elements concerning public policy or personnel policy would still be available to a probationary employee. The Town argued that 7-32-4113, MCA, was the controlling statute: "Every applicant ... must first serve for a probationary period of not more than 1 year. At any time before the end of such probationary term, the mayor ... may revoke such appointment."

The Supreme Court agreed that the police statute controlled. So, the question was whether the later-enacted WDEA limited the mayor's authority to revoke appointment. Under the rules of statutory construction, said the Court, it did not. "The Legislature ... did not remove a mayor's discretion ..." As a matter of law, the public policy and personnel policy elements of the WDEA "do not give a probationary police officer grounds for wrongful discharge from employment." Even though District Court had reached the right result for the wrong reason, the Supreme Court affirmed.

In its own appeal, the Town argued it was entitled to attorney fees and costs. It asserted that the reciprocity statute (28-3-704, MCA), in combination with the WDEA costs statute (39-2-915, MCA), supported the entitlement. The Court found the argument ignored "the plain language" of the law: "a party is not en-

titled to attorney fees unless that party both makes a written offer which is refused and prevails in the action." In this case, there was no written offer to arbitrate.

Justice Leaphart dissented. He disagreed that the police statute overrode the "public policy" element of the WDEA. "Clearly, the legislature was interested in requiring that employers treat their employees consistently with public policy regardless of whether the employees were probationary or permanent employees." With the majority's reading, "This precedent would seem to make a mockery of any concern with public policy."

Justice Rice specially concurred. He agreed with Leaphart's contention that District Court got it wrong. Just because an employee was probationary wouldn't preclude claims under the public policy and personnel policy elements. (See *Motarie v. Northern Montana Joint Refuse Disposal District*, page 123.) However, Rice agreed with the majority's application of 7-32-4113, MCA, in this case.

Roos v. Kircher Public School Board of Trustees, School District No. 3 (2004) — ***administrative law, contested case*** *320 Mont. 128, 86 P.3d 39*

The dispute over nonrenewal of a teacher's contract must cite statutory or constitutional law to merit a contested-case hearing. Merely citing the school district's policy wasn't enough.

Judy Roos was a nontenured teacher at Kircher Elementary School. At the end of her third school year, the School Board voted not to renew her contract. The district's policy said that probationary teachers would receive notification "on or before the first of May" about their contracts. State law requires written notice to nontenured teachers by June 1 (20-4-206, MCA). The Board voted on Roos's contract on May 20.

Roos grieved the action, saying the Board violated its own policies. The Board denied her grievance, and she filed an appeal with the Custer County Superintendent of Schools, seeking a contested-case hearing. The Board argued that the issue was not a contested case under the governing administrative rules. The County Superintendent instead accepted Roos's appeal. The Board took the issue to the State Superintendent of Public Instruction, who reversed the County Superintendent and dismissed Roos's appeal. Roos took the issue to court. District Court affirmed the State Superintendent, and Roos appealed.

On appeal, Roos argued that the district's policy gave her greater rights than the statute, and the Board's failure to inform her of nonrenewal by May 1 gave her standing to appeal. Not so, said the Supreme Court: "an aggrieved person must be able to identify a legal right to contest a school board's decision; absent a statutory or constitutional right to a hearing, a county superintendent does not have jurisdiction to hear a matter." Further, the Court cited *Irving v. School District No. 1-1A* (see page 72), to reinforce that a nontenured teacher has no right to appeal nonrenewal of her contract. Affirmed.

Stafford v. State of Montana and Department of Corrections (2004) — ***WDEA, probation, collective bargaining agreement, tort*** *2004 MT 96N (unpublished)*

In this non-cite case, the Supreme Court found no merit in the wrongful discharge and tort claims of a probationary employee under the collective bargaining agreement.

Kellie Stafford hired on in a training assignment as a treatment court officer with Probation and Parole in Bozeman. During her probationary period, the Department of Corrections gave her a "hearing," along with a union representative and her attorney. The Department discharged Stafford. She filed a lawsuit under the Wrongful Discharge Act, with an alternate claim of negligent hiring, retention, and supervision. District Court granted summary judgment to the State, and Stafford appealed.

Stafford recognized that the WDEA doesn't apply to an employee "covered by a written collective bargaining agreement." However, because she was on probation and couldn't grieve her discharge, she ar-

gued, her CBA didn't "cover" her. The Supreme Court didn't buy her argument; she was covered. In fact, she invoked that coverage when she brought a union rep to the hearing.

Even if the CBA put her probationary status at will, Stafford argued that the State couldn't fire her "for an otherwise unlawful reason, i.e. due to the negligent conduct of its employees." In her effort to get the Court to recognize a tort of negligent hiring, retention, and supervision, Stafford offered "no legal rationale or authorities" to support the argument. The Court affirmed summary judgment.

Tvedt and L.L. Tvedt Insurance, Inc. v. Farmers Insurance Group, et al. (2004) — ***contract, covenant, WDEA, contractor / employee*** *321 Mont. 63, 91 P.3d 1*

The defendant in this case didn't waive its right to terminate a contract "at will," nor did it breach the covenant of good faith and fair dealing. However, questions remained about the plaintiff's status as employee or independent contractor.

Lee Tvedt started working for Farmers Insurance in 1978. In 1986, Farmers made him District Manager in Missoula, and they signed a Manager's Agreement. In 2000, Tvedt formed a corporation – L.L. Tvedt Insurance, Inc. Farmer's set up a Corporate Agreement with his corporation, naming it District Manager and Tvedt himself as Supervising District Manager. Both contracts provided for "at-will" termination upon 30 days' notice. Both also said Tvedt and his corporation were "independent contractors," rather than employees.

In June 2001, Farmers terminated its relationship with Tvedt with 30 days' notice. He sued for breach of contract. He asserted that Farmers had waived the at-will clauses, so it couldn't terminate simply on notice. He also asserted that Farmers had breached the implied covenant of good faith and fair dealing. Finally, Tvedt said his status really was employee, not contractor, so he sought damages under the Wrongful Discharge from Employment Act. Farmers won summary judgment in District Court, and Tvedt appealed.

Tvedt argued that Farmers used its discretion under the contracts to act unreasonably and dishonestly. This, he said, breached the implied covenant of good faith and fair dealing. Farmers said it hadn't used discretion, it had exercised a express right under the contract. The Supreme Court agreed: "implied contractual provisions will not be applied where, as here, express provisions govern." (See *Farris v. Hutchinson*, page 86.) The Court affirmed summary judgment on this issue.

Tvedt argued that Farmers interactions with him "induced a belief that it was waiving its discretion to terminate at will." Farmers had set forth written "Standards" for District Managers; managers had to attain the standards to continue their contracts. Tvedt claimed that achieving the Standards guaranteed renewal, thus waiving at-will termination. Not so, said the Court: "The *Standards* also contained a clause stating, 'This program in no way modifies the Companies' right to terminate on 30-days notice, with or without cause ...'" The Court affirmed summary judgment on this issue.

Tvedt argued that he was an employee, not an independent contractor, and was entitled to pursue a claim under the WDEA. In his individual status as District Manager, he was under the "control and direction" of Farmers. Even after Farmers entered into a Corporate Agreement with Tvedt's corporation, it maintained the Manager's Agreement with him individually. Farmers said the Corporate Agreement supplanted the Manager's Agreement on the basis of "novation." State law described novation as "a new obligation between the same parties with intent to extinguish the old obligation" (28-1-1502, MCA). District Court had ruled on that basis, but Tvedt pointed out that the contracts didn't have the "same parties": one was with him, one was with his corporation. The Supreme Court agreed. Because District Court had not gone beyond novation to determine if Tvedt was an employee or a contractor, that was an issue to be dealt with on remand.

Justice Leaphart dissented: "Farmers clearly waived the 'at will' provisions in the Agreements ..." In setting forth the Standards, Farmers was stating possible reasons for terminating the agreement. "Standards

are the antithesis of 'at will' discretion," wrote Leaphart. Although Farmers stated in the Standards that it was retaining its at-will option, Leaphart demurred: "I do not buy into this Orwellian double speak."

Pannoni v. Board or Trustees, Browning School District No. 9, Smyth, and Werner (2004) — ***discrimination*** *321 Mont. 311, 90 P.3d 438*

A "qualified individual" under disability discrimination law means the person can do the essential functions of the job, with or without a reasonable accommodation. The person bears the burden of proving he or she is qualified. In this judicial review of a human rights case, the Supreme Court held that the person hadn't done so.

The Browning School District employed Russ Pannoni as a teacher for 16 years. The District operated seven schools. Rather than permanently assigning a teacher to a school, it retained the flexibility to transfer teachers where they were most needed. After Pannoni taught in Babb for five years, the district transferred him to an elementary school in Browning. Pannoni grieved this action; he split his role for one year between Babb and Browning, and the next two years he taught only in Babb. When the district transferred him to Browning Middle School, he really resisted.

Just as his term at the middle school was starting, Pannoni took FMLA leave. His physician said Pannoni suffered depression, aggravated by his assignment to the middle school. The district got a second opinion from a psychiatrist, who concluded Pannoni wasn't disabled; rather, he was angry about the transfer. The district then asked for a third opinion and medical certification. Pannoni provided neither. Pannoni continued working for the district for three more years, missing a cumulative 43% of his days of work. Finally, the district got another psychiatric evaluation; it concluded Pannoni was unable to work because of his depression. Pannoni asked for an extension to his unpaid leave. Instead, the district terminated his employment.

Pannoni filed a discrimination complaint with the Human Rights Bureau. After a hearing, the agency ruled he wasn't a qualified individual because he couldn't perform the essential function of reliably showing up for work. The Human Rights Commission affirmed this decision, and at the first level of judicial review, so did District Court. District Court also disallowed submitting evidence acquired after the fact.

On appeal, Pannoni urged the Supreme Court to inject the "plausibility standard" into its analysis of reasonable accommodation. Under this theory, "it was at least plausible to believe" that granting the extended leave would have enabled Pannoni to do his job the next academic year. The Court disagreed: "Pannoni has failed to establish a plausible reason to believe that another leave of absence would enable him to adequately perform his job." The district had reasonably given Pannoni one long leave of absence; it didn't have to keep granting leave if the first one failed. Because Pannoni was not a qualified individual, he wasn't entitled to any further accommodation.

Pannoni also appealed the denial of two additional items of evidence. One was a medical report issued by a psychiatric social worker in Canada. Because no one testified about the report, its content was excluded as hearsay. The Court affirmed. The other was a letter from the district HR Director that said Pannoni was ineligible for rehire with the district. The Court noted that the Human Rights Bureau's decision didn't address this issue, but it was "harmless error." "Since Pannoni did not apply for re-employment, there was no refusal of re-employment which would have constituted a separate and distinct act."

Pannoni wanted to present other evidence that District Court had ruled out: (1) a psychological report obtained more than a year after the human rights hearing and (2) a district letter to Pannoni discussing what he'd have to do to get rehired. Pannoni cited the "good reason" he hadn't presented the evidence at the initial hearing: it didn't exist at the time." The Court ruled against the report; Pannoni had rolled the dice in favor of the report from Canada. When that didn't work, he couldn't seek another opinion after the hearing. The district's letter was likewise excluded: "Pannoni has not shown that the letter from the School's counsel is relevant to the issues presented."

The district cross-appealed on the denial of costs. The district had asked Human Rights to award costs after Pannoni rejected a settlement offer, then lost at hearing. Human Rights said it didn't have the authority to award costs in a contested administrative case. District Court had agreed that Human Rights lacked statutory authority in this area, and the Supreme Court affirmed.

Justice Cotter dissented, joined by Justice Regnier: "I believe that the agency, the district court, and this Court misinterpreted and then applied the wrong legal standard of proof ..." In Cotter's view, the "plausibility standard" advanced by Pannoni was legitimate. Had it been applied, the burden would have shifted to the school district to show that his requested leave of absence was an undue hardship. As it stood, the decision placed "too heavy a burden on Pannoni."

Bailey v. Beartooth Communications Company, Sunbelt Communications Company, and Stebbins (2004) — ***WDEA, probation*** *321 Mont. 305, 92 P.3d 1*

When a new owner takes over a business, do the employees start a probationary period? In this case, a jury decided yes. The Supreme Court affirmed.

For 10 years, Pam Bailey worked advertising sales for a Helena TV station, KTVH. Beartooth Communications bought the station in July 1997. In November 1997, the company suspended Bailey for giving company information to a competitor. Beartooth then discharged Bailey. Bailey sued, alleging that the discharge was not for good cause.

In the preliminary litigation, District Court dismissed two defendants: Sunbelt Communications (Beartooth's parent corporation) and Bill Stebbins (general manager of the station). The case went to trial, and Beartooth argued that Bailey was a probationary employee at the time of discharge. Even if she wasn't, it claimed, it had good cause to discharge her. The jury concluded that Beartooth had hired all KTVH staff as new employees when it bought the station. As new employees, they had a probationary period. Beartooth discharged Bailey during probation, so the question of good cause didn't apply. Bailey moved for a new trial on procedural grounds and appealed when District Court denied her motion.

One issue on appeal was an exhibit shown to the jury during Beartooth's closing argument. It was the page from the employee handbook that Bailey had signed. It contained a statement about her employment having "no defined duration" that could be "terminated at any time." On Bailey's objection, District Court told the jury to disregard this seeming "at-will" statement. The Supreme Court found that the page had already been part of the evidence, and District Court properly addressed the issue.

The second issue on appeal concerned a possible misrepresentation during jury selection. None of the prospective jurors said they knew Bailey or her husband; the husband wasn't present during selection. During the trial, one juror confided to the judge that she had briefly met Bailey's husband several years before. The judge kept her on the panel. In moving for a new trial, Bailey said there was more to the story, citing a 1996 legal dispute that involved both Bailey and the juror. The Supreme Court found no "adversarial relationship" had occurred in that dispute. Besides, Bailey hadn't brought it up during jury selection. The Court affirmed District Court.

Burchett v. MasTec North America, Inc. (2004) — ***WDEA, jurisdiction*** *322 Mont. 93, 93 P.3d 1247*

A "Montana resident" worked for a Florida corporation in Oklahoma, California, and Indiana. After he was fired in Indiana, he sued the employer in Montana. The Supreme Court held that Montana courts had jurisdiction over the complaint.

MasTec lays fiber-optic cable. The company hired Ron Burchett while he was living in Massachusetts and sent him to various locations across the country. After a dispute with his boss, Burchett got fired in Indi-

ana. He filed suit under the Wrongful Discharge from Employment Act against MasTec in Yellowstone County. On MasTec's motion, District Court dismissed the lawsuit for lack of subject-matter jurisdiction.

Although Burchett didn't have a written contract with MasTec, the Supreme Court examined the case as "an employment contract" and applied contract law. The Court examined a guideline that said, "The law of the state chosen by the parties to govern their contractual rights and duties will be applied ..." (§187 of Restatement (Second) of Conflict of Laws). Burchett pointed out that MasTec had agreed to pay his income-tax withholding, unemployment insurance, and wages to Montana. The Court agreed that, in doing so, "MasTec manifested its intent to be governed by Montana law."

Further, another section of the same guideline addresses the residence of the parties (§188(2)(e)). The Court found that Burchett clearly showed he was a Montana resident. His job with MasTec was "transitory," so he didn't establish residency in any other state. Even so, argued MasTec, the WDEA lacks any specific provision for applying it out-of-state; Indiana law should apply to Burchett's discharge. The Court noted that Indiana is an "at-will" state, while the WDEA "affords better protection to employers and employees."

The Court concluded, "it would be appropriate to apply Montana's WDEA to this case, regardless of the fact that it does not expressly provide for extraterritorial application." Given that the WDEA could apply to this "contract," "it naturally follows that Montana courts have subject matter jurisdiction in a case involving a Montana resident when Montana law applies." The Court reversed District Court and remanded the case.

Chief Justice Gray dissented. She disagreed with the Court deciding the conflict of law issue before the "threshold issue" of subject-matter jurisdiction. This process "puts the cart before the horse." Gray cited the section of the WDEA that exempts any case "subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" (39-2-912, MCA). Because Indiana law should apply to a discharge occurring in Indiana, the WDEA itself "precluded extraterritorial application." Justice Nelson joined in the dissent.

Pankratz Farms, Inc. v. Pankratz / Pankratz v. Pankratz Brothers, et al. (2004) — ***WDEA, constructive discharge*** *322 Mont. 133, 95 P.3d 671*

A big cut in pay didn't constitute constructive discharge when the person kept working. Failure to perform assigned duties constituted good cause for the eventual discharge.

Family disputes probably lead to the most contentious litigation, and this case proved it. The six Pankratz brothers were owners of Pankratz Farms, Inc. Four of the brothers began protracted efforts to buy out the other two and terminate their "employment" with the corporation. Marvin Pankratz was one of the two brothers on the outs. He rejected all offers. When the corporation cut all salaries by 90%, Marvin hung on. Finally, the brother who was foreman of the operation fired Marvin for not doing some duties assigned to him. The corporation then took legal action to evict Marvin from his house, which the corporation owned. At that point, all sorts of litigation busted loose.

Among several issues, Marvin included a claim for wrongful discharge, which District Court dismissed. On appeal, he argued that the drastic pay cut breached the employment agreement and effectively terminated his employment well before his formal discharge. The Supreme Court gave a nod toward "constructive discharge" but found "there is no evidence that Marvin voluntarily terminated his employment ... following the pay cuts." He "remained in the active employ" of the corporation, so there was no actual or constructive discharge. When the corporation discharged Marvin, it had good cause because "he refused to perform duties assigned to him."

Haux v. Montana Rail Link, Inc. (2004) — ***statute, statute of limitations*** *322 Mont. 456, 97 P.3d 540*

A state labor law dealing with railroads provides the basis for citing "mismanagement" as a cause of action in challenging a discharge. The Supreme Court recognized the claim for the first time; however, the Court also found that this claim exceeded the statute of limitations.

Fred Haux worked as an engineer for Montana Rail Link. The railroad discharged him for allegedly stealing leftover hamburger from an employee picnic. Haux filed a lawsuit, claiming that his discharge was negligent and malicious, violating 39-2-703, MCA. District Court granted summary judgment to MRL on the grounds that the statute did not provide an independent cause of action for mismanagement.

Haux's appeal focused on that issue. The Supreme Court examined the statute, which read, in part:

> A person or corporation operating a railway or railroad in this state is liable for all damages sustained by any employee of the person or corporation in consequence of the neglect of any other employee of the person or corporation or by the mismanagement of any other employee and in consequence of the willful wrongs, whether of commission or omission, of any other employee of the person or corporation when the neglect, mismanagement, or wrongs are in any manner connected with the use and operation of a railway or railroad on or about which the employee is employed. (39-2-703, MCA)

In the Court's view, "The language is clear, unambiguous, direct and certain." The Court had reached a similar conclusion on this law in 2000 (see *Winslow v. Montana Rail Link*, page 151). "Unlike common law claims for negligence, mismanagement is a cause of action newly created by § 39-2-703, MCA." Haux's glimmer of hope faded quickly, though: "The applicable statute of limitations for a cause of action arising from statute is two years." Because Haux had filed this suit almost three years after his discharge, his claim was time-barred.

Justice Warner specially concurred. He wrote that the *Winslow* case created a "new, previously unheard of, statutory tort of railroad mismanagement." Yet, the Legislature convened twice after the *Winslow* decision. "I presume," wrote Warner, "the Legislature was aware of the Court's interpretation of the statute, and if it disagreed would have amended it accordingly."

Hanson v. Dix dba Roosevelt Hotel and Estate of Maag (2004) — ***discrimination, WDEA, liability*** *2004 MT 263N (unpublished)*

In this convoluted non-cite case, the person who owned the business before and after the discharge, but not at the time of discharge, could not be liable to the plaintiff.

In 1998, Carl Dix sold the Roosevelt Hotel to John Maag under contract for deed. Dix stayed on as maintenance man. Loren Hanson worked for Maag at the hotel. In 1999, Dix offended Hanson with a sexual gesture while Hanson was working. After Hanson's partner complained to Maag about the incident, Maag fired Hanson.

Hanson filed a discrimination complaint with the Department of Labor and Industry. While the case was pending, Maag died. His estate ceded the hotel to Dix under default in the contract for deed. The Department let Hanson substitute Dix and Maag's estate as defendants. The Department then dismissed the complaint.

Hanson filed suit, alleging discrimination and wrongful discharge. Dix won summary judgment on the fact that he wasn't Hanson's employer, so couldn't have discharged him. Hanson appealed with three arguments: (1) Dix was successor in interest of the hotel and therefore liable for the discharge, (2) summary judgment had not addressed the discrimination claim, and (3) Hanson shouldn't have to pay Dix's attorney fees.

The Supreme Court gave short shrift to Hanson's appeal. First, "there is no authority in Montana law that the seller under contract for deed is held liable as the equitable owner of property for torts of the buyer." Nor was there any authority to transfer potential liability to Dix when he resumed ownership under default. "There is no question that Dix had no employment relationship with Hanson," so neither claim (wrongful discharge or discrimination) could survive. And because Hanson pressed on with his untenable litigation, the award of attorney fees to Dix was appropriate.

Arnold v. Yellowstone Mountain Club, LLC (2004) — ***WDEA, policy, good cause***
323 Mont. 249, 100 P.3d 137

In this case, legitimate questions precluded summary judgment — whether the employer violated its own policies and whether it had good cause for the discharge.

Kim Arnold started as a housekeeper for Yellowstone Mountain Club, a ritzy resort in Big Sky. Within six months, she was promoted to "co-supervisor" in housekeeping. Arnold tried to get clarification and structure in the job, but received little guidance. After about a year, her manager told her he was demoting her to housekeeper. Arnold left the meeting, swearing as she went. The manager phoned security; as Arnold left the resort, a security guard told her she was discharged for unprofessional conduct and use of abusive language.

Arnold filed a wrongful-discharge suit, claiming YMC had discharged her without good cause and without following its own policies. Citing no disputed facts, District Court granted summary judgment to YMC. Arnold appealed.

The YMC employee handbook provided a "three-tiered approach" to discipline. It also cited certain acts as grounds for immediate discharge. One of those acts was "use of abusive and threatening language"; the handbook did not list "unprofessional conduct." The handbook also said "all instances ... are to be examined thoroughly," and the grounds for immediate dismissal would be "depending on circumstances." Given this language, the Supreme Court said it would be necessary to consider not only Arnold's conduct at the final meeting, but also "the events which led to that meeting." Because many of those facts were in dispute, summary judgment was an error.

Those same disputed facts called into question whether YMC had good cause to fire Arnold. YMC cited these "facts": (1) the handbook authorized immediate discharge, (2) Arnold swore at her boss, (3) Arnold stormed out of the meeting, (4) on the way out, she dropped her walkie-talkie and didn't pick it up. Arnold cited these "facts": (1) she received no reprimands while working at YMC, (2) she didn't fail to perform her duties nor caused any disruption to operations, (3) in response to a bank inquiry, YMC had said she had "excellent prospects" of continued employment, (4) she had received no progressive discipline prior to being demoted, (5) she had tried to get clarification about her job, (6) she had asked for a performance evaluation, as required by the handbook, but hadn't received one.

The Court concluded that Arnold met the test of offering evidence disputing good cause. "The facts alleged by Arnold ... allow for the 'reasonable inference' to be drawn that YMC's stated reason for termination was merely a pretext to avoid facing her concerns and following the three-tiered disciplinary process." The unsettled issues of fact led the Court to overturn summary judgment.

Justice Cotter concurred with an added observation. She noted that, "the way the Handbook is written, virtually any objectionable employee action could result in immediate termination." Cotter said District Court erred in stopping its analysis upon finding that Arnold had violated one of the 29 listed offenses. Justice Leaphart agreed with Cotter's observation.

Bellanger v. American Music Co. and Kelman (2004) — ***tort, preemption, constructive discharge, privilege*** *325 Mont. 221, 104 P.3d 1075*

A person who isn't an agent of a company isn't privileged against a claim of tortiously interfering with the

relationship between the company and its employee. Yet the same person may have created the circumstances leading to the employee's constructive discharge.

Zollie Kelman founded American Music; he transferred ownership to two daughters about 10 years before the events in question here. He remained a creditor of the business and owner of the building it was in. He also hung around a lot, keeping a personal interest in how the business went. Linda Bellanger worked for American Music about nine years. After she quit, she filed this action against the business and Kelman. She alleged that Kelman's "abusive, threatening, and intimidating manner" forced her into constructive discharge and that Kelman tortiously interfered with her employment.

District Court granted summary judgment to both defendants, concluding that Bellanger had not shown "sufficiently intolerable" working conditions to constitute constructive discharge. The court also found that Kelman was an agent of American Music, so he was privileged against the claim of tortious interference. Bellanger appealed.

On the issue of constructive discharge, Bellanger claimed there were "numerous instances" of Kelman's abusive behavior, but District Court focused on just one. American Music argued that Kelman was not her employer, nor was American Music responsible for Kelman's actions. The Supreme Court held that the "conflicting evidence" precluded summary judgment.

Regarding Kelman's agency, the Court found it undisputed that (1) American Music did not employ Kelman and (2) American Music made it clear to Bellanger that Kelman had no managerial authority. "Because Kelman is not the principle, his unsupported declaration of agency cannot ... magically transform him into AMC's agent." Thus, Kelman had no privilege to protect him from Bellanger's claim of tortious interference. The Court reversed and remanded.

Justice Rice dissented with regard to the second holding. He wrote that District Court had reasonably concluded "that AMC caused ... Bellanger to believe the Kelman was its agent." Bellanger then conducted herself on that belief that Kelman had authority over her. On this basis of "ostensible agency," Kelman should have been protected against Bellanger's tort claim.

*Cole v. Valley Ice Garden, LLC, and Martel (2005) — **contract** 327 Mont. 99, 113 P.3d 275*

In a four – three decision, the Supreme Court held that terminating a hockey coach's contract for a dismal win-loss record didn't constitute "cause." However, the Court reversed on damages, ruling that the coach drafted the contract, so he wasn't entitled to the benefit of Montana's law on liquidated damages.

In 1997, William Martel "bought" the Bozeman Ice Dogs, an American West Hockey League team. Martel took ownership because the prior owners and builders of the Valley Ice Garden couldn't pay their obligations to him. Martel needed someone to run the team, so he hired Dave Cole as head coach and general manager. Martel asked Cole to draw up a contract; Cole drafted a five-year contract. One condition said that termination "for other than cause" would result in a payout of one year's salary and a bonus matching the prior year.

The hockey team had a good first season under Cole, but a lousy second one. They won only 30% of their games, and attendance dropped. Cole convinced Martel to sink a lot of money into improving the team, but the third season started with a 1-6 record. Martel fired Cole after those seven games. Cole accepted a $15,000 severance payment but declined to sign a release from liability. He then sued for breach of contract and of the implied covenant of good faith and fair dealing. District Court ruled that Martel had fired Cole without cause. Rather than holding to a one-year payout, the court awarded a five-year payout worth $199,193. Valley Ice Garden, as the prime defendant, appealed.

Was the termination for cause? VIG argued that any uncertainty would work against Cole, since he wrote the contract. Anyway, a poor record reflects "poor job performance" by the coach, so VIG had cause. Cole

admitted he was fired for a bad won-loss record. However, he said, the contract did not list any duty to maintain a specific won-loss record, so the record could not apply to the question of cause. The Supreme Court agreed, affirming that Cole was terminated without cause.

Did that entitle Cole to the full five-year payout? At issue was 28-2-712, MCA, a law that deals with "pre-determined" damages in the event of a breach of contract. Subsection (1) of the law says that this sort of clause is void, unless subsection (2) applies. Subsection (2) allows the parties to agree on an amount if it would be difficult to determine the actual damages. Cole's contract provided for a one-year payout. Cole argued that the clause was void as a form of liquidated damages that the law disallows. VIG pointed out that Cole didn't think the clause was so bad when he wrote it.

The Supreme Court agreed with VIG: "... Coal waived the benefit of the liquidated damages law by virtue of the contract provisions he drafted." Cole argued successfully that he was fired without cause, which would trigger the contract's one-year payout. "It is incongruous for Cole to seek on the one hand to enforce one provision of the contract he drafted and at the same time distance himself from another provision that he now concludes in hindsight is less than lucrative." The Court reversed the award of damages and ordered enforcement of the contracted one-year payout.

Justice Rice dissented, joined by Chief Justice Gray and Justice Leaphart. The dissent focused on whether the termination was for cause, and Rice said it was. "Cole's failure to define 'cause' when drafting the agreement does not mean that the term has no meaning." Looking at precedent, Rice noted that cause relates to a legitimate reason "logically related to the needs of the business." In this case, "[d]ischarging a coach of a professional sports team which is performing poorly ... is a discretionary decision related to the legitimate needs of the business and constitutes 'cause.'"

Barr v. Great Falls International Airport Authority, Great Falls Police Department, and Department of Justice (2005) — privacy, § 1983, negligence, WDEA 326 Mont. 93, 107 P.3d 471

Discharging a probationary employee because of a second criminal background check did not violate his right of privacy. Claims of civil rights violations and negligence also failed.

As part of his application to work security at the Great Falls International Airport, Jack Barr consented to a criminal background check. The check came back clean, and the Airport hired Barr with a six-month probation. After about a month, another security officer requested a criminal background check on Barr, which revealed an arrest in Alaska 30 years before for non-support. Another four months passed, then the Airport discharged Barr before the end of his probation.

Barr sued, claiming violation of his right to privacy, negligence *per se*, negligence, and violation of his civil rights. He sued the Airport as his employer, the police department at the "gateway" to the background check, and the Department of Justice as the provider of criminal background information. District Court granted summary judgment to all three defendants. Barr appealed.

Barr argued that accessing and disseminating his arrest record violated (1) his right of privacy under the Montana Constitution, (2) the state Criminal Justice Information Act, and (3) the federal Crime Prevention Policy Act. The Supreme Court noted that "Barr's Alaska arrest was clearly public information." And since Barr had consented to a criminal background check, he had no reasonable expectation of privacy.

Barr claimed that the Airport's refusal to keep him past probation violated his civil rights under 42 U.S.C. § 1983. However, none of the defendants qualified as "persons" under that law and there had been no violation of his right of privacy. Likewise, Barr's claim of negligence *per se* failed; such a claim requires proving a statutory violation. The Court had already determined that no violation occurred.

Barr's negligence claim alleged failure to enforce restrictions on access to criminal justice information and allowing unauthorized persons to request it. Of importance was the fact that the security officer who re-

quested the second check did so without the Airport's permission and outside the scope of his job. However, the officer made the request "through fully authorized channels." And because the arrest information was public record, the responding agencies did nothing wrong in releasing it.

On a final note, the Wrongful Discharge from Employment Act came into play, sort of. Barr never claimed wrongful discharge. District Court had ruled that Barr's claim properly belonged there, but he was on probation, so it didn't matter. In his appeal, Barr argued that the WDEA was not an exclusive remedy. The Supreme Court said it didn't matter; Barr had never made a claim under the WDEA, so there was "no controversy" to consider.

Rolison v. Bozeman Deaconess Health Services, Inc. (2005) — ***discrimination*** *326 Mont. 491, 111 P.3d 202*

Discrimination claims require plaintiffs to provide substantive evidence in (1) establishing a *prima facie* case and (2) showing the employer's reasons as pretextual. In this case, Rolison failed to do so.

Bill Rolison started work as a registered nurse at Bozeman Deaconess in June 2000. In March 2001, he filed a gender discrimination claim with the Montana Human Rights Bureau. In September 2001, he tendered a letter of resignation, citing a hostile work environment consisting of retaliatory accusations and close managerial scrutiny. He then filed a discrimination claim with the Equal Employment Opportunities Commission and a retaliation claim with the Human Rights Bureau. After the federal and state agencies issued "right to sue letters," Rolison pursued his claims in court.

District Court granted summary judgment to Bozeman Deaconess on the retaliation claim. A jury trial on the discrimination claim came down in favor of the hospital, too. Rolison moved for a new trial, which District Court denied. He then appealed to the Supreme Court.

In his appeal, Rolison asserted he was constructively discharged, based on the way the hospital treated him after he filed his discrimination claim. However, he produced no evidence supporting constructive discharge. And in an earlier deposition, he "disavowed" the constructive discharge claim. Given that disavowal, the Supreme Court said, "we need not address it further." Rolison also argued that Bozeman Deaconess refused his resignation and decided on "summary dismissal." The Court didn't buy it: "the record establishes he resigned on September 18 and Deaconess accepted his resignation on September 24."

Regarding the underlying discrimination claims, the Court found that Rolison had failed to state his *prima facie* case of retaliation. He offered no concrete evidence of adverse employment action against him. The Court affirmed summary judgment. The Court also affirmed denial of a new trial, holding that Rolison had not shown that District Court abused discretion.

Matthews v. Don K Chevrolet (2005) — ***default judgment*** *327 Mont. 456, 115 P.3d 201*

Failure of the defendant's attorney to respond to this lawsuit resulted in a default judgment. The Supreme Court affirmed, ruling that District Court had not abused its discretion.

When Don K Chevrolet terminated five employees, they tried to consolidate an action against the company. Don K resisted the effort and District Court to denied their motion. Matthews then filed this action individually, and his attorney served the complaint on Don K's attorney, Jack Quatman. Quatman signed for the service and handed that matter to his assistant to calendar and file. She failed to calendar and she misfiled the complaint, so Quatman didn't file an answer within the required 20 days. Matthews's attorney filed for default. He also sent a letter to Quatman a week before the hearing, giving notice of the hearing. No one appeared on behalf of Don K at the hearing, so District Court entered a default judgment and awarded Matthews $185,000. Don K failed in its motion to set aside the default, so this appeal ensued.

On appeal, Don K cited three grounds under Rules of Civil Procedure: good cause, excusable neglect, and extraordinary circumstances. Quatman said his law practice was in a "state of confusion" due to relocation at the time of Matthews's service. In addition, his legal assistant was "experiencing personal problems." The Supreme Court found, though, "that there was ample opportunity to answer Matthews's complaint." The Court also gave weight to the letter from Matthews's counsel, notifying Quatram of the default entry and the scheduled hearing. The Court found that none of the cited rules excused the failure to respond. The Court affirmed the default judgment.

Justice Warner dissented. "Considering the record presented," he wrote, "recognizing the policy that a decision on the merits is preferable, and applying the rule that when the circumstances are such as to lead the court to hesitate ..., it is better, as a general rule, that the doubt should be resolved in favor of the motion to set aside ..." Justice Cotter joined in the dissent.

Xu v. McLaughlin Research Institute and Carlson (2005) — ***procedure, sanctions, res judicata***
328 Mont. 232, 119 P.3d 100

A *pro se* plaintiff's failure to attend depositions or answer interrogatories resulted in dismissal of his case. The Supreme Court also affirmed dismissal of his second lawsuit on the grounds of *res judicata* and collateral estoppel.

Dr. Xin Xu's lawsuit against McLaughlin Research Institute alleged (1) wrongful discharge, (2) blacklisting, (3) discrimination, (4) breach of the covenant of good faith and fair dealing, (5) emotional distress, and (6) negligent breach of the duty of care in providing references. Shortly after filing the suit, Xu fired his attorney. His second attorney quit, and Xu represented himself after that.

As discovery proceeded, Xu gave incomplete, unsatisfactory answers to McLaughlin's interrogatories. He failed to appear at a scheduled deposition. On McLaughlin's motion, District Court ordered Xu to respond to written discovery requests and to be deposed. He did neither. He did, however, file a second lawsuit on the same set of facts, throwing in a defamation claim for good measure.

McLaughlin moved for sanctions against Xu. In granting the motion, District Court dismissed his case with prejudice. Xu then served McLaughlin with the second complaint. District Court concluded that dismissal with prejudice amounted to "adjudication on the merits," so *res judicata* precluded the second action. In addition, Xu could have alleged defamation in his original claim, so collateral estoppel also applied to the second claim.

Xu appealed, but without success. The Supreme Court said, "While we typically provide wide latitude to *pre se* litigants in their attempts to comply ..., all litigants, including those acting *pro se*, must adhere to our procedural rules." Clearly, Xu didn't. "We conclude from the record that Xu knowingly and repeatedly refused to cooperate with discovery requests." Dismissal was the appropriate sanction in the first case, and the Court affirmed dismissal of the second case on the grounds of *res judicata* and collateral estoppel.

Boston v. Bitterroot International Systems, Inc., et al. (2005) — ***procedure*** *2005 MT 207N (unpublished)*

After losing a jury trial, the employer filed for judgment as a matter of law, a new trial, and redetermination of damages. However, it filed a supporting brief beyond the deadline allowed under rules, so the motion was denied.

Terry Boston worked as a load planner for a trucking company. A shoulder injury kept him off the job for a couple months. When he returned to work, he learned that his job was gone. He sued for violations of Family and Medical Leave Act, Wrongful Discharge from Employment Act, and Fair Labor Standards Act. A jury awarded him $225,000 on the FMLA claim and $98,700 on the WDEA claim. The jury found in favor of BSI on the FLSA claim.

BSI moved for judgment as a matter of law, a new trial, and redetermination of damages. Under District Court rules, BSI then had five days to submit its supporting brief; BSI filed its brief on the eighth day. District Court never ruled on the motion, so it was deemed denied. BSI appealed. Boston cross-appealed denial of his motion for summary judgment on his FLSA claim.

The Supreme Court said a rule's a rule and refused "to review the deemed denial" of BSI's post-trial motion. Regarding Boston's cross-appeal, he had challenged BSI treating his job as an exempt position under FLSA. He had sought summary judgment on this issue, but District Court denied it. The jury then found in BSI's favor. The Supreme Court said BSI had raised factual issues sufficient to preclude summary judgment.

Winslow v. Montana Rail Link, Inc. (2005) — ***statute, preemption, punitive damages, sanctions*** *329 Mont. 260, 121 P.3d 506*

The first appeal in this case took place in 2000 (see page 151). Here, the Supreme Court held that the first appeal set the rules for this case. The Court also upheld the denial of punitive damages.

In short, here's what led to this lawsuit. After working as a Montana Rail Link switchman for eight years, Gary Winslow claimed a workplace injury. He underwent surgery for a hernia and returned to light duty. MRL discharged Winslow for dishonesty. The company said his hernia was a pre-existing condition over three years and his industrial-injury claim was fraudulent.

As a result of the first appeal, Winslow was allowed to proceed with litigation, charging MRL with "negligent mismanagement" under 39-2-703, MCA. (See also *Haux v. Montana Rail Link*, page 169.) The case went before a jury, which returned a verdict finding both parties negligent — MRL 61.25% and Winslow 38.75%. After they finished the math, the jury awarded Winslow compensatory damages of $384,328. The jury also ruled that punitive damages should be assessed, but that MRL had not acted with malice. Before this issue went any further, District Court excused one of the jurors on personal business. District Court then ruled that punitive damages were impossible without a finding of actual malice or actual fraud. Winslow appealed on this issue. MRL cross-appealed on the overall legal underpinning of the case.

The Supreme Court first looked at MRL's issues: (1) Winslow didn't have a legitimate cause of action under 39-2-703, MCA, and (2) the Railroad Labor Act and Employee Retirement Income Security Act preempted Winslow's state claim. The Court held it had decided the first issue in the first appeal; that ruling became "the law of the case," and the Court refused to revisit it. Likewise, the first appeal held that Winslow's claim did not invoke the collective bargaining agreement, so preemption under the RLA didn't apply. The Court agreed that MRL had waived the other preemption because it "failed to raise its ERISA argument until years after the commencement of the litigation ..."

With regard to punitive damages, the Court didn't get to the meat of Winslow's arguments. State law allows deliberations by "less than twelve jurors" only if both parties agree to it and District Court approves (3-15-106, MCA). After District Court dismissed one of the jurors, MRL said it would not consent to having a jury of eleven members deliberate on punitive damages. Even though this wasn't District Court's reason, the Supreme Court held it was correct to disallow consideration of punitive damages.

Winslow also sought sanctions against MRL "for obstructing witnesses, concealing information, and for improper use of boilerplate objections." The Supreme Court acknowledged the case had undergone "lengthy litigation" with "resolute advocacy" by MRL's lawyers. At the same time, it "involved numerous unique questions of law" and "difficult issues of proof." Given all that, the Court affirmed District Court's denial of sanctions.

Justice Cotter, joined by Justice Nelson, specially concurred. What troubled Cotter was District Court's dismissal of one juror "without the advance consent of the parties." This was an error that allowed MRL

"to escape consideration of punitive damages" simply by refusing to agree to a jury of eleven. However, Cotter pointed out that there would be no way to fix it unless the whole case went back to trial "on both liability and punitive damages." Winslow chose to keep the compensatory award, and the Court could not remand for a trial on punitive damages alone: "The case cannot be split." So, concluded Cotter, "I concur in the result reached by the Court."

Sterrett v. Tilleman Motor Company (2005) — ***WDEA, good cause*** *2005 MT 286N (unpublished)*

In the absence of any factual dispute, the Supreme Court upheld summary judgment that the employer had good cause, as a matter of law, to discharge the employee. This was a non-cite opinion.

Doug Sterrett managed the body shop for Tilleman, a Havre dealership for new and used cars. When a married couple had problems with a Buick they bought, Sterrett told them the car was "a piece of shit." This led to negotiations in which Tilleman reduced the sale price by 22%. Tilleman fired Sterrett for "willfully neglecting" the employer's interests, noting a prior warning for similar comments about a Chevy Cavalier. Sterrett filed a wrongful-discharge action, claiming Tilleman discharged him without good cause. Tilleman won summary judgment in District Court, and Sterrett appealed.

Sterrett argued that the motivation of the customers in bringing back the Buick was a factual issue relevant to good cause. The Supreme Court disagreed: "We conclude that TMC's reasons for discharging Sterrett, as stated in the Separation Report, constitute legitimate business reasons." Sterrett introduced no facts to challenge those reasons, so summary judgment stood.

McConkey v. Flathead Electrical Cooperative, et al. (2005) — ***WDEA, good cause, policy***
330 Mont. 48, 125 P.3d 1121

In this case, the Supreme Court reinforced its stance that executives serve under broad discretion of their employers, here a Board of Trustees. The Court also ruled that the Board adopted "an appropriate disciplinary procedure" by engaging in one.

Warren McConkey was general manager of Flathead Electrical Cooperative for 14 years, until his discharge in February 2002. In the last four years of his job, McConkey's business decisions led FEC to the brink of bankruptcy, and its Board was split on whether to fire him. In an August 2001 meeting, the Board voted 7 to 5 to retain him. A subsequent performance review was likewise conflicting. Finally, in February 2002, the Board voted unanimously to discharge him. McConkey filed suit, claiming that FEC discharged him without good cause and in violation of its own policies. District Court granted summary judgment to FEC.

In looking at McConkey's appeal, the Supreme Court made it clear "the discretion we afford employers is at its greatest in cases like this one, where the employee occupies a 'sensitive' managerial position exercising 'broad discretion.'" McConkey's first attack on summary judgment involved the four reasons that District Court had cited in granting it. McConkey said FEC cited only one of the reasons in its discharge letter. The Court agreed that "reasons for discharge other than those set forth in a discharge letter are irrelevant, and thus inadmissible." However, evidence offered to substantiate the reasons is admissible. Here, the four cited reasons related to the letter's statement that McConkey had caused a negative financial impact for FEC.

Still, countered McConkey, the Board was aware of those reasons when it voted to keep him, then used the same four reasons to fire him. Thus, he argued, the reasons were "false, whimsical, arbitrary, and capricious." "What McConkey really argues," said the Court, "is that the Board cannot change its mind without further justification." Not so, said the Court, urging caution "in second guessing employment decisions of the company's board."

McConkey argued that FEC violated its policy that said, "In a case where the General Manager is the subject of disciplinary action, the Board will adopt an appropriate disciplinary procedure." This "procedure," said McConkey, must be "progressive." The Court found nothing in the policy statement requiring discipline to be progressive: "We decline to read extraneous statements into the FEC's written policy." Still, argued McConkey, the board failed to adopt any procedure. The Court concluded that the Board adopted a procedure "when it held several meetings to consider McConkey's performance and continued employment, put him on paid administrative leave while these discussions progressed, voted to terminate him and then provided him with written notice and justification." That is, by doing the procedure, the Board adopted it.

McConkey cited another policy that said discipline would ensue "if an employee ... demonstrates an inability to meet standards of job performance or conduct." He said it remained a disputed fact as to whether he really couldn't do the job. The Court declined to "second guess" the Board's decision whether McConkey met the job standards. The Court affirmed summary judgment across the board.

Chief Justice Gray specially concurred, addressing the issue of adopting "an appropriate disciplinary procedure." Gray disagreed that the Board's actions constituted compliance with a policy to adopt a procedure. The Board needed to adopt a procedure before engaging it. No difference for McConkey, though, because he didn't raise the issue that whatever procedure the Board might have adopted would have been different than what the Board did. Gray nodded toward a "distinction without a difference." Her purpose, she wrote, was "an abundance of caution and concern for future cases." She would not want other employers relying on the reasoning in the Court's decision.

*Wurl v. Polson School District No. 23 (2006) — **contract, covenant, due process, collective bargaining agreement, WDEA, grievance** 330 Mont. 282, 127 P.3d 436*

A school employee whose individual contract expired didn't have a reasonable expectation that employment would continue. Her tort and contract claims were unsuccessful.

Holly Wurl worked nine years as a speech-language pathologist for the Polson School District. Each of those years was subject to a one-year "Teacher Contract." Her contracts referred to the District's Master Agreement with the teacher's union. In May 2002, the School Board voted not to renew Wurl's contract for the next school year. The Board didn't follow the Master Agreement's procedures for termination. Nor did Wurl use the Master Agreement to grieve the decision. She filed this lawsuit instead, claiming wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of due process.

District Court granted summary judgment to the School District, based on several conclusions. (1) Wurl's claim under the Wrongful Discharge from Employment Act was exempt because of her contract. (2) Her contract did not incorporate the Master Agreement into its terms. (3) Wurl was not a "teacher" under the terms of the Master Agreement. (4) Even if Wurl's job came under the Master Agreement, she didn't use the agreement's grievance procedure. (5) Her individual contract had no provision that would give Wurl an expectation of renewal.

Although the Supreme Court determined an error in District Court's ruling, it affirmed summary judgment. At issue was language in Wurl's contract regarding the Master Agreement: "the Teacher signing this [contract] assents to each provision of the said school salary schedule and other provisions as outlined in the Master Agreement." The District argued (and District Court had agreed) that "other provisions" referred only to advancing along the salary schedule, but not to termination procedures. The Supreme Court ruled otherwise: "we conclude that the employment contract clearly and unambiguously incorporated the entirety of the [Master Agreement]."

That didn't change the outcome, though. The School District maintained its alternative argument – Wurl didn't use the grievance procedure. Wurl argued for equitable estoppel on that argument. She claimed that the School Superintendent had told her and the Board that she couldn't use the grievance procedure. The Court said the Superintendent's statement "was his legal interpretation"; estoppel requires a factual representation. The Court affirmed that Wurl's claims were barred by her failure to use the grievance procedure in the Master Agreement.

Scobey School District v. Radakovich (2006) — ***due process, collective bargaining agreement, statute*** *332 Mont. 9, 135 P.3d 778*

After a first appeal sent this case back for administrative review (see page 149), the Supreme Court again ruled that District Court had erred in reversing the administrative decisions.

After Mike Radakovich was RIFed as a tenured teach in Scobey, a long appeal process began. This included an arbitrator's decision that upheld the RIF under the collective bargaining agreement and an administrative review that upheld the process that brought about the RIF. District Court reversed the administrative review and ordered Radakovich reinstated. The Supreme Court found errors in the court's decision and in the administrative review, so the process started over.

When the County Superintendent reviewed the case again, he made detailed findings that led to a decision to uphold Radakovich's termination. The State Superintendent affirmed that decision. District Court again reversed, holding that the School District's good-cause criterion violated the collective bargaining agreement and the tenure statute. The School District appealed.

At the crux of this case was "endorsement," certifying the subject or subjects a teacher is qualified for. Radakovich had only one endorsement – social studies. The School District's good-cause criterion said that multiple endorsements were preferable to single endorsements when cutting teachers in a small school. So, the District had RIFed Radakovich while retaining teachers who had less seniority or even no tenure, but had multiple endorsements. District Court had ruled that this criterion was improper under tenure law; the Supreme Court disagreed. Neither the law nor precedent, said the Court, "require a school district, when faced with economic restructuring and impending RIFs, to absolutely protect tenure and seniority rights."

On the other hand, said the Court, "a school board has the authority, and arguably the duty, to manage its school district in a financially responsible manner." The Court held that the endorsement issue was a reasonable basis for good cause to RIF Radakovich. The Court also held that the criterion was objective and fairly applied. The Court noted that the collective bargaining agreement didn't contain the provision for "multiple endorsements"; it relied on seniority and evaluations when deciding RIFs. However, said the Court, "that issue was finally decided via binding arbitration in December of 1994." The arbitrator had upheld applying the criterion under the terms of the CBA, and District Court had no authority to change that holding. Ultimately, the Court reversed District Court's ruling and ordered reinstating the County Superintendent's decision. What that means, in plain English and after 12 years, is that Radakovich stayed RIFed.

Justice Nelson dissented, saying the ruling created a dangerous "loophole" that will "enable school boards to terminate tenured teachers in favor of less qualified and lower paid non-tenure teachers ..." Nelson wrote that neither the CBA nor the tenure law include the multiple-endorsement criterion. "Rather, this criterion was constructed from whole cloth by the District without input from the teachers." Recognizing this "facile, artificial gimmick" as legitimate, in Nelson's opinion, diminished the right of tenure and opened a door for abuse.

*Haynes v. Shodair Children's Hospital (2006) — **WDEA, grievance procedure** 332 Mont. 286, 137 P.3d 518*

You snooze, you lose. Here, the plaintiff submitted his grievance both late and improperly. The Supreme Court ordered dismissal with prejudice.

Steve Haynes worked 12 years at Shodair, advancing to Director of Information Services. Dissatisfied with management's responses to his complaints about a subordinate's absences, Haynes quit. The next day, Shodair sent him a copy of the hospital's grievance policy. It required four elements: (1) filing within five business days, (2) using the required grievance form, (3) signing the form, and (4) sending it to the employee's supervisor. Haynes missed on all four – after eight days, his lawyer sent a letter, unsigned by Haynes, to Shodair's lawyer. Shodair rejected Haynes's grievance, deeming it late and noncompliant.

Haynes filed suit under the Wrongful Discharge from Employment Act. Shodair asserted the defense under 39-2-911, MCA, that Haynes had failed to initiate a proper grievance. District Court agreed that Haynes didn't "comply strictly" with the deadline. The court concluded, though, that the policy was "confusing" and Haynes received "mixed messages." Moreover, his failure to comply with "formalities" shouldn't doom his complaint. District Court dismissed the suit *without* prejudice, pending the outcome of the grievance. Shodair appealed.

In the eyes of the Supreme Court, "the dispositive issue [was] Haynes' failure to meet the five-day deadline required by Shodair's internal grievance policy." Haynes didn't deny he received a copy of the policy, nor did he deny that he failed to comply. He argued that his voluntary resignation meant the grievance policy didn't apply to his situation. The Court found this argument "both circular and unavailing." If he left voluntarily and not under duress, he had no wrongful discharge claim at all. If he was constructively discharged, as he claimed, the grievance procedure applied to him.

Under these circumstances, the statutory provisions were "neither confusing nor unclear." As in *Offerdahl v. State of Montana* (see page 155), failing to exhaust the grievance procedure "is a complete bar" to pursuing a lawsuit under the WDEA. The Court reversed District Court and ordered dismissal of Haynes's lawsuit *with* prejudice.

*Vogel v. Intercontinental Truck Body, Inc. (2006) — **WDEA, workers' comp, judicial estoppel** 332 Mont. 322, 137 P.3d 573*

This plaintiff, successful in his occupational disease claim, was judicially estopped from pressing a wrongful discharge claim.

Greg Vogel painted truck bodies at Intercontinental's manufacturing plant in Conrad. Over a period of five years, he experience work-related problems with his knees, shoulders, elbows, and wrists. When he was no longer able to do his job, Intercontinental discharged him. Vogel filed a claim of injury and occupational disease with the Department of Labor and Industry. He also filed a lawsuit under the Wrongful Discharge from Employment Act.

Over the next two years, Vogel completed vocational rehabilitation. He successfully settled the occupational disease claim. When he tried to get this lawsuit moving, Intercontinental moved for summary judgment. Intercontinental argued that Vogel's occupational disease claim established that he couldn't do his job, so he couldn't pursue wrongful-discharge damages for losing the job. District Court granted summary judgment on the basis of judicial estoppel.

Vogel's appeal led the Supreme Court to recap the four elements of judicial estoppel: (1) the party knew the facts at the time he made the original claim – it was clear that Vogel knew of his discharge when he filed his report of injury. (2) The party succeeded in maintaining the original claim – Vogel received $16,750 in settling his claim of occupational disease. (3) The subsequent claim was inconsistent with the

original one – Vogel's argument that he would have been able to do his job belied his occupational-disease claim. (4) The original claim misled the adverse party so that allowing the estopped party to change its claim would injuriously affect the adverse party – Vogel's wrongful-discharge claim would expose Intercontinental to liability for damages. With all four elements satisfied, the Court affirmed judicial estoppel.

*Arredondo v. City of Billings Department of Police and Billings Police Commission (2006) — **due process** 2006 MT 154N (unpublished)*

In this non-cite opinion, the Supreme Court upheld the discharge of a police officer for sexual misconduct after a lengthy criminal and administrative process.

Police Officer Dan Arredondo came under internal investigation, based on complaints from several women about his sexual behavior on the job. After a seven-month suspension with pay, he received notice of a due-process hearing. The notice detailed the allegations against Arredondo and said he would have the chance to respond. Neither Arredondo nor his lawyer attended. When Arredondo demanded a second due-process hearing, but the City had already sent him notice of his discharge.

A couple months before the discharge, the City also hired a special prosecutor to press a criminal case against Arredondo on three counts of misdemeanor official misconduct. When Arredondo appealed his discharge to the Police Commission, the City moved to have the Commission wait until the criminal case was resolved. Since Arredondo didn't object, the Commission granted the motion. In the criminal case, Arredondo waived his right to a speedy trial and engaged in legal maneuvering that delayed the trial for two years. At the end, though, a jury acquitted him on two counts, and the third was dismissed.

After that, it took almost two years to restart the administrative process with the Police Commission. After a four-day hearing, the Commission upheld Arredondo's discharge. Arredondo petitioned District Court for judicial review. He alleged statutory errors by the City in appointing a special prosecutor in its criminal case. The court pointed out that Arredondo failed to raise this issue before the Police Commission, so he couldn't press it in litigation.

Arredondo argued that his right to due process was violated when the City didn't provide a due-process hearing. The court said he had received clear notice of the first hearing but didn't attend. Anyway, his due process was fully protected by the Police Commission hearing. Arredondo said the nearly five-year period between his discharge and the Commission hearing also violated due process. However, "this delay was in large part Arredondo's doing." District Court affirmed the Police Commission, and the Supreme Court affirmed District Court.

*Mayer v. Billings Nissan, LLC (2006) — **WDEA, procedure** 2006 MT 158N (unpublished)*

The Supreme Court upheld a jury verdict in favor of the employer, ruling that District Court hadn't erred in how it conducted the trial.

Marylynn Mayer worked as finance manager at Billings Nissan. When her boss discharged her, the termination form stated the reasons as rudeness to customers, insubordination, and poor work quality. Mayer's wrongful-discharge lawsuit claimed she had been fired in retaliation for opposing the illegal practice of "padding." Padding means listing more options than a car has in order to get a higher loan rate for it. The lawsuit went to trial before a jury.

At trial, her boss testified that Mayer had never discussed padding with him; he also denied the dealership engaged in the practice. Mayer's lawyer tried to trip up the boss during cross-examination, but the judge sustained several objections over the methods. In addition, the lawyer neglected to introduce a key item of evidence, so the judge disallowed cross-examination regarding it. The jury decided in favor of Billings Nissan.

Mayer's appeal focused on her lawyer's efforts to "impeach" the boss, arguing that District Court had improperly blocked the attempt. The Supreme Court found that District Court had allowed the attempt but had kept the lawyer between the rails on how to go about it. If the lawyer failed to impeach the boss, it was "hardly the fault of the trial judge." The Court also ruled that the lawyer's attempt to use undisclosed evidence was properly excluded. Affirmed.

Harper v. City of Kalispell and Kalispell Parking Commission (2006) — ***procedure*** *2006 MT 165N (unpublished)*

In this non-cite opinion, the Supreme Court gave short shrift to Harper's *pro se* action. Harper was appealing District Court's summary judgment for the City in his wrongful termination lawsuit. The Supreme Court said Harper "failed to meet a threshold requirement" in his appeal: "Although his brief includes passing references to several laws, Harper cites no legal authority supporting his claim of [District Court's] error. Accordingly, we decline to address the merits of his arguments." Summary judgment affirmed.

Cromwell v. Victor School District No. 7 (2006) — ***WDEA, damages*** *333 Mont. 1, 140 P.3d 487*

The Supreme Court examined the term "reasonable diligence" in the damages section of the Wrongful Discharge from Employment Act. The Court held that the employer has the burden of proof regarding lack of diligence in seeking employment.

The Victor School District hired Sandra Cromwell as an administrative assistant in 1998. She completed a six-month probationary period and, a few months later, received a promotion to Business Manager. At that time, she signed an agreement providing for "full-time, year-round" employment. The agreement didn't state an end date; Cromwell signed a similar agreement at the beginning of each fiscal year. A couple years after promoting Cromwell, the District adopted a policy for classified employees that provided for "annual contracts of a specified term." This applied only to employees hired after the policy took effect.

At the end of the 2003 school year, the school board discharged Cromwell. She received severance pay worth 11 weeks' salary. She sued the District for wrongful discharge, and the case went before the district judge for a bench trial. The District admitted it had discharged Cromwell without good cause, but argued that her situation was exempt because she had signed a contract for a specified term. District Court concluded otherwise and ruled that the District had wrongfully discharged Cromwell. The court awarded her no damages, though, ruling that she had failed to "exercise reasonable diligence" in finding another job. Both parties appealed.

The District's appealed challenged the wrongful discharge, relying on the agreements Cromwell signed each year. Under the terms of the employee handbook, though, Cromwell had achieved "permanent status" when she completed probation. In addition, none of the agreements she signed had an ending date. The Supreme Court affirmed that they weren't "written contracts for a specified term" under 39-2-912, MCA. The Court upheld the ruling of wrongful discharge.

Cromwell's appeal challenged the lack of any damages. District Court had state a legal conclusion that Cromwell "failed to present sufficient evidence that reasonable employment opportunities were not available ..." The Supreme Court noted that Cromwell's testimony about her efforts to find another job was "the only evidence" presented at trial. The School District hadn't presented any evidence; it tried only to impeach Cromwell's testimony. This wasn't right, said the Court: "the School District, rather than Cromwell, had the burden of proving Cromwell's failure to mitigate."

The Court has repeatedly held that 39-2-905, MCA, places the discretion to award damages with the "trier of fact." In this case, that was the district judge. When the judge "reversed the burden" of proving lack of

diligence, the error resulted in an abuse of discretion. The Court reversed the ruling on damages and remanded the case for further proceedings.

Russell v. Masonic Home of Montana, Inc. (2006) — ***WDEA, grievance*** *334 Mont. 351, 148 P.3d 619*

The Supreme Court stood fast by the Wrongful Discharge from Employment Act's requirement to exhaust the grievance procedure. Even though the employee felt that filing a grievance wouldn't do any good, she still needed to go through the process.

For three years, Doris Russell worked as administrative assistance to the administrator of the Masonic Home, a residential care facility. After a couple years, the administrator took a vacation and left Russell in charge. During this time, several employees complained about working conditions and other issues; Russell took these issues to her boss when she returned. This wasn't well received, and the boss began shunning Russell, even treating her with hostility. After a few months of this, Russell resigned because of an intolerable work environment. In her resignation letter, she said it would be futile to file a grievance, since the boss would be the same person deciding the grievance.

The boss accepted Russell's resignation and sent her a copy of the facility's grievance policy. Russell didn't file a grievance, she filed suit, claiming a wrongful constructive discharge. District Court granted summary judgment to the Masonic Home, leading to this appeal by Russell.

Russell first argued that the Masonic Home's policy on grievances didn't mandate that she use it. The policy said an employee "may file a written complaint" to pursue a grievance. The use of "may," argued Russell, made the process "permissive." Not so, said the Supreme Court: "This language does not relieve Russell, however, from complying with the mandatory requirement to exhaust the internal grievance policy pursuant to § 39-2-911(2), MCA." As in *MacKay and Orcutt v. State of Montana* (see page 161), the word "may" gives the employee the option of grieving or not grieving, but not the option of suing instead of grieving.

Next, Russell argued that the Court should "waive" exhausting the grievance procedure because it would have been futile. The Court didn't buy into Russell's "speculation." "The mere possibility of an adverse decision does not render the process futile and does not excuse Russell from complying with the policy before instituting her suit."

Finally, Russell challenged the constitutionality of §39-2-911, MCA. The statute, she said, violated her right of access to the courts. Because the law doesn't require an employer to inform the employee that failing to exhaust the grievance procedure bars a lawsuit, Russell said it was constitutionally flawed. The Supreme Court declined to consider her argument because Russell was late giving notice of the constitutional issue to the Court and the Attorney General. The Court affirmed summary judgment.

Department of Corrections v. State of Montana, Dept. of Labor and Industry, Board of Labor Appeals, and Morrow (2006) — ***misconduct, code of ethics*** *334 Mont. 425, 148 P.3d 902*

This case involved unemployment benefits; that's why Department of Labor and Industry is the primary defendant. The Supreme Court affirmed denying benefits because of "misconduct."

Richard Morrow worked as probation and parole officer for Corrections. Henry Denison, one of his probationers, gave Morrow an envelope marked "open in the event of my death." One month later, Denison completed probation, and two weeks later, he was killed in an accident. When Morrow opened the envelop, he found Denison's will. The will named Morrow as personal representative and a devisee, receiving a house, a pickup, some acreage, and personal items.

At some point, a citizen's complaint questioned the propriety of the arrangement. Corrections suspended Morrow while it investigated the matter, and then fired him. The reasons for the discharge focused on accepting the envelope, along with other issues of performance and conduct.

Because of the misconduct, DLI denied unemployment benefits to Morrow. He appealed to the DLI Hearings Bureau. The hearing upheld the denial of benefits, saying Morrow, among other things, had violated 2-2-104, MCA, by accepting a gift of substantial value. Morrow appealed to the Board of Labor Appeals, which reversed the decision and awarded benefits. Corrections filed in District Court for judicial review. The district judge reversed the Board and reinstated denial of benefits. Morrow appealed to the Supreme Court.

The Court recognized misconduct as grounds for denying benefits. It noted the statutory code of ethics for public employees, which prohibits accepting a gift of substantial value. Corrections also had a departmental code of ethics that prohibited accepting any gift. Morrow argued that this "gift" from a dead person could not influence his official actions. He didn't know what was in the envelope before opening it. Maybe he should have dealt with it differently, but it was a "good faith" mistake. The Court found that "Morrow's acceptance of this substantial devise violated the DOC's rule and Montana law that a public employee is prohibited from accepting gifts meant to influence or reward for official action taken." He didn't get unemployment benefits.

Campanella v. Montana Department of Transportation (2007) — WDEA, grievance, exemption, statute of limitations 335 Mont. 212, 156 P.3d 1

A grievance procedure available outside the agency is not an "internal" procedure under the Wrongful Discharge from Employment Act statute of limitations (39-2-911, MCA). So, the plaintiff isn't entitled to the 120-day "tolling period" in that statute. The Department of Transportation differs from other state agencies because state law provides a grievance procedure specifically for MDT employees (2-18-1001, MCA). Under that law, employees may take their grievances before the Board of Personnel Appeals.

MDT discharged Mark Campanella on July 16, 2003. He filed a grievance under the statute with the Board of Personnel Appeals. The outcome of that grievance is not part of the record. On November 12, 2004 – one year and 119 days after his discharge – Campanella filed this wrongful-discharge suit. MDT sought dismissal, arguing that (1) the discharge was exempt under 39-2-912, MCA, by virtue of the statutory remedy, (2) Campanella failed to exhaust administrative remedies under 39-2-911, MCA, and (3) his lawsuit was filed beyond the one-year limitation in 39-2-911, MCA. District Court went with number 3 and dismissed the suit.

Campanella appealed. He relied on language of 39-2-911, MCA, which requires an employee to exhaust "internal procedures" before filing an action. The statute also tolls the one-year statute of limitations while the internal procedure proceeds, but the maximum extension is 120 days. Campanella contended that the grievance statute for MDT employees was an internal procedure, so he was entitled to the 120-day extension.

The Supreme Court allowed that even a statutory procedure could be internal, "if so designed." However, the statute says the employee must have "exhausted all other administrative remedies." It would be these other remedies that are internal, meaning the statutory remedy is external. Because it was an external procedure, Campanella could not claim the 120-day extension under 39-2-911, MCA. The Court affirmed that Campanella's lawsuit was filed too late.

Chief Justice Gray specially concurred. She agreed with the result, but thought there was a simpler line to it. Because the statutory process involved the Board of Personnel Appeals, she wrote, it was external to Department of Transportation.

Willet v. Town of St. Ignatius (2007) — ***due process, good cause*** *2007 MT 38N (unpublished)*

In this non-cite opinion, the Supreme Court completed judicial review of a police chief's discharge by affirming it.

Charles Willet served as Police Chief in St. Ignatius for a little over three years. For the last two years of his employment, the mayor met with him regularly to discuss performance and citizen complaints. Despite the mayor's instructions and a written warning, Willet didn't improve. The mayor discharged Willet for unsatisfactory performance. Willet took his case before the St. Ignatius Police Commission, which upheld the discharge. Willet petitioned District Court for judicial review, and the Court affirmed the commission.

On appeal, Willet argued that he was denied an impartial hearing and that inadequate notice and grounds for termination violated his due process rights. The Supreme Court examined the record and simply said "these arguments are without merit." Affirmed.

Johnson v. Costco Wholesale (2007) — ***WDEA, good cause, procedure*** *336 Mont. 105, 152 P.3d 727*

The Supreme Court used this case to clarify its approach in reviewing a "judgment as a matter of law." Rather than applying the "abuse abuse of discretion" standard to such cases, the Court decided that "the *de novo* or plenary standard of review is appropriate." In the end, the Court ruled that factual disputes remained in this case that precluded judgment as a matter of law.

Ellery Johnson worked in the bakery at the Billings Costco for 10 years. Throughout his employment, Costco had a "no grazing" policy for employees; the policy literally said, "If you didn't buy it, don't eat it!" As often happens, the policy was observed more in the breach than the enforcement. That is, until Cindy Peterson took over as General Manager of the store. She laid down the law regarding the policy, stating that any violation would result in termination.

In February 2003, Johnson picked up a danish roll from the salvage cart. Salvage goods are those removed from the shelf and set aside for donation to the rescue mission or food bank. Johnson took a bite of the danish, said it was bad, and threw it away. When word of this got to Peterson, she met with Johnson and checked in with Costco executives. When all was said and done, Costco fired Johnson for violating the no-grazing policy by taking a bite of salvage danish. Shortly after Johnson's departure, another Costco employee was reported for eating a piece of pie dough but didn't receive any disciplinary action.

Johnson filed suit under the Wrongful Discharge from Employment Act, and the case went to a jury trial. ; Before the trial concluded, District Court granted Costco a judgment as a matter of law; the court held that Johnson's fateful bite of danish was good cause for his discharge. Johnson appealed.

Before getting at the meat of Johnson's appeal, the Supreme Court departed from its usual, boilerplate "standard of review." The Court said it had used "two inconsistent approaches" in reviewing "grant or denial of a motion for judgment as a matter of law." Sometimes it had applied the *de novo* standard for reviewing legal questions, sometimes the abuse-of-discretion standard for reviewing evidentiary issues. Enough of the inconsistency, said the Court, it would now treat such cases as a "question of law" requiring *de novo* review.

In his appeal, Johnson contended factual issues remained for the jury to decide. He argued that several other Costco employees violated the no-grazing policy, but he was the only one ever fired for it. In response, Costco cited *Fenger v. Flathead County* (see page 126) to argue that a policy violation was good cause for discharge. The Court disagreed: "Here, unlike in *Fenger*, there are still issues of fact as to whether Costco equally applied its employment policies." Such factual issues should go before a jury to decide, so District Court's judgment as a matter of law was wrong.

The Court went on to "address Johnson's pretext argument." Johnson contended that Costco's real reason for firing him was to control the personnel budget in the bakery. On the day of his discharge, he said, he was due a pay raise, and his supervisor had expressed concern that "high-end employees" may need to go. The Court found no evidence to support this argument, calling it "speculation." The Court ruled, as a matter of law, that no factual dispute existed regarding a possible pretext.

Johnson also argued that Costco violated its own personnel policy. One part of its policy provides that only the executive vice-president could discharge a long-term employee like Johnson. He said that didn't happen. The Court found "nothing in the record, beyond speculation by Johnson, that [the executive VP] did not make the decision ..." The Court ruled, as a matter of law, that no factual dispute existed regarding a policy violation. In the end, the Court remanded for further proceedings on the question of good cause to discharge the danish-eating baker.

Harding v. Garcia and Professional Health Planning, Inc. (2007) — ***WDEA, procedure***
337 Mont. 271, 159 P.3d 1083

This is a purely procedural opinion focusing on the timing of an appeal. The Supreme Court held that Garcia's appeal was on time, given the sequence of events in District Court. The case came back on a second, unpublished opinion (see page 188).

When Libbie Harding began contesting her discharge under the Wrongful Discharge from Employment Act, she offered to arbitrate the dispute, as provided in 39-2-914, MCA. Garcia rejected the offer. As Harding pressed litigation, she twice had to move District Court to compel discovery. After the first effort, the court granted sanctions to cover costs. After the second effort, the court said it would decide further sanctions after trial.

Harding prevailed in a jury trial. Then the maneuvering started regarding costs, attorney fees, and sanctions. District Court awarded the costs of pursuing judgment and denied Garcia's post-trial motions. Harding pursued the matter further, seeking sanctions on the second motion to compel discovery. District Court granted sanction. A few days later, Garcia filed an appeal. Harding claimed it was too late, as more that 30 days had passed since denial of post-trial motions. The Supreme Court disagreed, ruling that "no 'final judgment' was entered until District Court entered its ... order setting the amount of ... sanctions." The Court denied Harding's motion to dismiss the appeal.

Milanovich v. Schnibben, dba Heart and Land Ortho (2007) — ***contract, venue*** *337 Mont. 334, 160 P.3d 562*

The Supreme Court ruled that the Illinois-based employer agreed in contract to settle any disputes in Montana court.

Chuck Schnibben asked his old pal Phil Milanovich to come work at his orthodontic practice in Illinois. Milanovich drafted an employment contract, and both signed. Although sloppily drafted, the contract contained a paragraph stating that "venue for enforcement" would be "state district courts of Lewis and Clark County, Helena, Montana." When Schnibben later terminated Milanovich, Phil sued for breach of contract, filing the action in Lewis and Clark County. Schnibben moved to dismiss "for lack of personal jurisdiction." District Court granted the motion, and Milanovich appealed.

"Personal jurisdiction," noted the Supreme Court, "can be waived by express or implied consent." A "forum-selection clause," such as the venue provision at issue here, would be unenforceable only if made without clear deliberation and understanding. The Court found that this contract's clause was "deliberately and understandingly made." District Court had found the venue clause "unclear and ambiguous." The Supreme Court disagreed and held that "Schnibben knowingly consented to personal jurisdiction in Montana ..." Reversed and remanded.

Tuttle v. Department of Justice (2007) — ***policy, good cause, statute*** *338 Mont. 437, 167 P.3d 854*

This judicial review of an administrative hearing found that the employer's policy did not mandate progressive discipline. Good cause existed for the discharge. A second, non-cite opinion case with a separate legal issue (see page 193) came up later.

Mitch Tuttle was a sworn Highway Patrol Officer who supervised the training of patrol cadets for five years. In December 2005, his captain questioned one of Tuttle's travel vouchers, wondering why Tuttle had stayed in Hamilton while working in Missoula. Tuttle's dubitable explanation led the captain to investigate further. The investigation uncovered several incidents of dishonesty, abuse of authority, misuse of resources, and sexual harassment. Following an administrative hearing on the charges, the Highway Patrol discharged Tuttle.

Tuttle petition District Court for judicial review. The court concluded that the Patrol's findings of fact and conclusions of law were correct. Tuttle appealed to the Supreme Court. He didn't contest the facts regarding his misconduct. Rather, he challenged the Patrol's conclusions of law. Specifically, he argued that the State's discipline policy, grounded in administrative rule, required progressive discipline instead of immediate discharge.

The Supreme Court's opinion recited relevant excerpts from the discipline policy. "Management shall, when appropriate, use progressive discipline," but "the appropriateness of using progressive discipline in each case lies within the discretion of management." "Discharge should not be an initial disciplinary action except in severe cases of unsatisfactory performance or behavior that disruptions agency operations."

Tuttle argued that the policy required "a single incident of egregious behavior"; instead, the Patrol had lumped together several minor incidents to justify firing him. First off, the Court disagreed that the incidents were minor: "Any one of these offenses could have constituted grounds for dismissal." Secondly, the plain language of the policy "could encompass a single incident or the pattern of misbehavior that MHP uncovered in this case." Tuttle also faulted the Patrol for failing to document his "minor misbehaviors as they occurred." The Court found no merit for this contention. The single investigation turned up "sufficient grounds" to discharge Tuttle.

Tuttle also challenged the Patrol's legal conclusion that he had sexually harassed a female trooper. The Court recounted his incidents of asserting authority over her, threatening her, calling her names, and making sexual advances. It was enough, said the Court, to support the conclusion that he created a hostile work environment. The Court upheld Tuttle's discharge.

Engelsberger v. Lake County (2007) — ***WDEA, default*** *339 Mont. 22, 167 P.3d 902*

The Supreme Court reversed a default judgment in this case only because District Court had not considered all three factors on whether to set aside the default. On remand, the Court said the case might still result in default.

Jimmy Engelsberger filed a wrongful-discharge complaint against Lake County in December 2002. Over the next two years, he tried to resolved the claim, but Lake County was unresponsive. Finally, Engelsberger served the County Commission with his action. The County failed to appear, and Engelsberger applied for default, which District Court granted. Lake County immediately moved to set aside the default; the court denied it. Engelsberger went before a jury to determine damages and received an award of $90,532. District Court denied the County's motion to set aside the judgment, leading to this appeal.

The Supreme Court restated its general principle that "judgments by default are not favored," so only "a slight abuse of discretion" may warrant reversal. The Rules of Civil Procedure require "good cause" to set

aside a default. The Court looked at precedent to delineate three factors of good cause: "(1) whether the default was willful, (2) whether the plaintiff would be prejudiced if the default should be set aside, and (3) whether the defendant has presented a meritorious defense to plaintiff's claim."

The Court agreed with District Court's finding that Lake County's failure to appear was willful. However, said the Court, that's only one factor. "When consider a motion to set aside a default, the District Court is compelled in every case to consider all three factors ..." For this reason, the Court remanded the case.

Stowers v. Community Medical Center, Inc. (2007) — ***WDEA, contract*** *340 Mont. 116, 172 P.3d 1252*

When the parties signed an Addendum to a contract that had expired three years prior, they ratified the original contract. Because the Addendum stated a specific term of employment, the case was exempt under the Wrongful Discharge from Employment Act.

John Stowers began working as an emergency physician at Community Medical Center in January 2000. At the time, he signed an Employment Agreement ending December 31, 2000. The contract allowed extension or renewal by mutual agreement in writing. When the contract expired, the parties did nothing and Stowers continued working at the hospital.

About 30 months after the contract expired, Stowers and CMC signed an "Addendum to Employment Agreement." It cited the original contract and said the parties had "orally extended" it. The Addendum provided an expiration date of January 31, 2004. It also provided that the original contract remained "in full force and effect," with the parties ratifying it through the Addendum. On January 27, 2004, CMC informed Stowers that it was terminating his employment on January 31.

Stowers filed suit under the Wrongful Discharge from Employment Act. CMC won summary judgment in District Court on the grounds that the Addendum provided a specific term of employment, making Stowers's complaint exempt under the WDEA (39-2-912, MCA). Stowers appealed, arguing that the contract had expired, so the Addendum couldn't have ratified it. And because the expiration date was in the Addendum's recitals, it was not operative. In addition, he argued, he hadn't read the Addendum before signing it, so he shouldn't be held to it.

The Supreme Court put no stock in Stowers's arguments. "The Addendum is not ambiguous; it contains the unequivocal statement that it is the intention of both parties to ratify all the terms and conditions of the original Employment Agreement, to which it specifically refers." The Court disposed of Stowers's "recitals" argument: "Recitals in a contract should be reconciled with the operative clauses of the contract and given effect as far as possible." And under "well established" law, Stowers was presumed to know the contract he signed. The Court affirmed summary judgment.

Justice Cotter dissented, joined by Justice Nelson, saying the Court had mistaken "the theory of ratification." Because CMC had not argued ratification when moving for summary judgment, Stowers had likewise ignored the theory. When District Court ruled ratification, Stowers tried to present evidence on his intent in signing the Addendum, but his motion was denied. Cotter wrote that Stowers's intent presented a factual issue that would preclude summary judgment.

Harding v. Garcia and Professional Health Planning, Inc. (2008) — ***WDEA, public policy, procedure*** *2008 MT 31N (unpublished)*

After the Supreme Court enabled Garcia's appeal to move forward (see page 185), this non-cite opinion was the outcome. Again, the case focused on procedure; Garcia's failure to object at trial doomed his appeal.

When Libbie Harding went to work for Professional Health Planning, she started having health problems.

The problems weren't related to her job, but they did affect her attendance. Shortly after radical surgery for breast cancer, Garcia discharged Harding. Harding filed suit, alleging the discharge was without good cause and in retaliation for refusing to violate public policy. The latter claim arose from Harding refusing to quit under pressure so that PHP's employee insurance wouldn't have to pay for reconstructive surgery. Harding also pursued punitive damages.

The jury came back with two conclusions: (1) it was not a discharge without good cause, (2) it was a retaliation for refusing to violate public policy. The jury awarded $20,000 damages to Harding but denied punitive damages. District Court later tacked on $47,000 in attorney fees and costs, related to sanctions and Garcia's refusal to arbitrate.

Garcia's appeal alleged error in instructing the jury, allowing evidence of past and future medical expenses, awarding attorney fees and costs, and allowing Harding's claim for punitive damages to go to trial. Harding argued that Garcia failed to make timely objections in trial court on all issues except the claim for punitive damages, which became moot when the jury denied the claim. The Supreme Court affirmed.

Vettel-Becker v. Deaconess Medical Center of Billings, Inc. (2008) — ***WDEA, discrimination, exemption*** *341 Mont. 435, 177 P.3d 1034*

A person's discrimination claim and wrongful discharge claim might not deal with the same issues. Here, the Supreme Court reversed summary judgment on the wrongful discharge claim; it was not automatically exempt under the Montana Human Rights Act.

Richard Vettel started as a chaplain at Deaconess in 1986. In less than a year, he became manager of the Pastoral Care Department. He held that job for the next 15 years, until being fired for received "mixed reviews" and not being "a good fit." The first 13 years of that period went quite well. In 1999, Vettel went through a divorce. About that time, his performance came under scrutiny, with some complaints about his management style. Deaconess assigned Vettel to coaching sessions with a management consultant, with largely positive results.

In 2000, Vettel remarried and added his wife's surname to his, becoming Vettel-Becker. Around that time, a 360 evaluation at the hospital yielded mixed results. His new boss, though, assured him he wasn't being fired. Meanwhile, Vettel-Becker's relationship with the management consultant began to sour. The consultant was critical of Vettel-Becker in written reports and said the new hyphenated name "pissed him off." By the end of 2001, the consultant was openly recommending a replacement for Vettel-Becker. This led his boss to change her tune and to recommend termination. After another 10 months and another evaluation with mixed results, Vettel-Becker received notice of his discharge. On the same day, he received notice of a managerial bonus.

Vettel-Becker filed a discrimination claim with the Human Rights Bureau; he also filed a wrongful-discharge lawsuit. When Human Rights dismissed his claim, Vettel-Becker amended the lawsuit to include discrimination and blacklisting. District Court granted summary judgment to Deaconess on all three counts. Vettel-Becker appealed only the dismissal of his wrongful discharge claim.

The Montana Human Rights Act sets forth the exclusive remedy for discrimination claims. On appeal, Vettel-Becker argued that he didn't get favorable result under the Human Rights Act, so it didn't bar a claim under the Wrongful Discharge from Employment Act. Further, he maintained that the "gravamen" of his discrimination claim differed from the gravamen of his wrongful discharge claim. Deaconess countered that Vettel-Becker "had his bite at the apple" when he filed his discrimination claim, in effect waiving all claims under the WDEA. The Supreme Court disagreed.

First, the Court noted precedent that when an administrative agency rejected an employee's statutory claim, the employee could still pursue a wrongful-discharge suit. (See *Shultz v. Stillwater Mining*, page 125). Of importance, though, was the separation of issues; that is, Vettel-Becker's wrongful-discharge

claim couldn't rely on the alleged discrimination. Vettel-Becker asserted that Deaconess discharged him without good cause, citing a few facts: (1) his last evaluation showed improvement, (2) he got a bonus the same day he was fired, and (3) his boss openly disliked him and reported refutable "incidents" of misconduct to top management.

"Discrimination can occur without a wrongful discharge," said the Court, "and wrongful discharge can occur without a discriminatory act." Given the differences between Vettel-Becker's two claims, the Court held that the exemption section of the WDEA didn't apply to his lawsuit. The Court also reversed District Court's finding on the merits of Vettel-Becker's wrongful-discharge claim. Vettel-Becker introduced sufficient facts, the Court said, to call into question Deaconess's purported good cause to discharge him. The Court remanded his wrongful-discharge claim for trial.

*Hager v. J.C. Billion, Inc. (2008) — **WDEA, constructive discharge, policy, damages***
343 Mont. 353, 184 P.3d 340

The employer didn't object to entry of its personnel policy into evidence. So, it had no legitimate objection when a jury instruction referred to the policy. In addition, the Supreme Court ruled that determining damages didn't require scrutiny of W-2 Forms or any other tax documents.

Rob Hager managed Billion Auto Body for J.C. Billion, a Bozeman dealership. After the company president gave Hager an "F" on his evaluation, Hager received a demotion to estimator and a 50% pay cut. Three months later, Hager quit. He filed a wrongful-discharge suit, claiming constructive discharge and violation of the company's personnel policy. The policy in question laid out a three-step "progressive disciplinary" process that included verbal and written warnings. After a jury trial, Hager proposed a jury instruction that a discharge is wrongful if the employer violated its own written personnel policy. Billion objected, saying the policy had no application to Hager's case. District Court accepted the instruction, and the jury awarded Hager $60,000.

Billion appealed, arguing that nothing in its policy required progressive discipline before changing Hager's job. Hager argued that those changes constituted a discharge and that Billion failed to follow its disciplinary process. The Supreme Court focused on the fact that Billion hadn't objected to introducing the policy at trial. The jury instruction was a proper application of the WDEA.

Billion also appealed the award of damages, asserting that Hager failed to support his lost wages with tax documents. The WDEA defines lost wages as the gross pay "that would have been reported to the internal revenue service as gross income on Form W-2 ..." That definition, said the Court, "does not restrict a lost wage calculation to amounts obtained directly from a Form W-2 or any other tax document." The Court found that Hager's testimony at trial about his lost wages and interim earnings provided "substantial credible evidence to support the damages award." Affirmed.

*Klein v. State of Montana, Department of Corrections (2008) — **collective bargaining agreement, exhaustion of remedies, tort** 343 Mont. 520, 185 P.3d 986*

In this case, the Supreme Court allowed two tort claims to proceed, even though the employee successfully pursued arbitration under the collective bargaining agreement.

Rebekah Klein worked as a probation and parole officer for the Department of Corrections. The Department received information that she had tipped off a Bozeman police officer who was the subject of an internal-affairs investigation. The Department put Klein on administrative leave and started an investigation. At one point, this investigation entailed a meeting with Klein and her union representative. According to Klein, management didn't inform her that the information from the meeting could be part of a criminal case. The Department gave the information to the Gallatin County Attorney, who unsuccessfully tried to prosecute Klein for official misconduct.

At the completion of the investigation, the Department held a due-process hearing with Klein. About three weeks after that, the Department discharged her for interfering with the police investigation. Under the terms of a collective bargaining agreement, Klein filed a grievance, claiming she had been fired without just cause. The grievance eventually went before an arbitrator. About two years after the discharge, the arbitrator found for Klein and ordered her reinstated with back-pay and benefits.

Before the arbitrator's decision, Klein had filed suit against the Department, listing four counts: (1) violation of due process, (2) tort of deceit for misrepresenting the investigatory meeting, (3) negligence in the conduct of the investigation, and (4) severe emotional distress. District Court granted summary judgment to the state, ruling that the grievance process in the CBA provided the appropriate remedies for Klein. She appealed.

The State advanced five reasons that Klein's appeal should fail. One, the CBA provided Klein's exclusive remedy. Two, under the language of the CBA, only statutory matters would fall outside the terms of the contract; with no statutory mandates in this situation, the CBA controlled. Three, precedent required broad interpretation of the CBA to bar tort actions like Klein's. Four, Klein could have sought other damages in her grievance but didn't, so she waived her right to pursue those claims further. Five, Klein received due process under the CBA, so couldn't claim a due-process violation.

For her part, Klein argued that her tort claims fell outside the terms of the CBA. The arbitration provision applied only to matters that the parties have agreed to arbitrate. In addition, she limited her grievance to the question of just cause for her discharge, and the CBA's language allowed her to pursue these civil claims.

The Supreme Court looked at the language of the collective bargaining agreement: "the ... question is simply whether the counts in Klein's Complaint concern the 'interpretation or application of the terms and provisions of' the CBA." Under this analysis, the Court affirmed dismissal of Count 1 (due process) and Count 3 (negligent investigation). Klein's grievance and arbitration under the CBA adequately dealt with those issues.

The Court reversed summary judgment on Count 2 (deceit) and Count 4 (emotional distress), while "expressing no view on the merit of these two claims." Both of these claims stemmed from the investigatory meeting with Klein and stood separate from the discharge issue in her grievance. "Indeed," said the Court, "the alleged actions of the [Department] are far afield of any employment action and have nothing to do with any of the rights, terms, and provisions enumerated in the CBA."

Chief Justice Gray concurred but favored a "more direct approach." The CBA's grievance procedure contained this clause: "Employees desiring to contest an employment action through alternative statutory or civil procedures may not contest the same employment action under the provisions of this Agreement's grievance procedure." In Gray's view, this clause made it clear that the CBA was not the exclusive remedy. And the Department's alleged treatment of Klein in the meeting would be "an employment action separate and apart from the later termination of her employment."

Justice Warner dissented, saying the Court gave "mere lip service" to the exhaustion of remedies under the CBA. Warner wrote that the Court incorrectly interpreted the CBA "to say that Klein can have her cake and eat it too." Even if some of Klein's claims fell outside the CBA, "it is the arbitrator, not a reviewing court, that makes the decision whether any such claims are arbitrable under the agreement." And all of Klein's issues under the grievance and the lawsuit arose from "the same integrated set of facts." The results in this case, said Warner, "deters both employers and unions from agreeing to arbitrate disputes."

*Buechsenschuetz v. Northern Rockies Orthopaedic Specialists (2008) — **WDEA, policy, procedure** 2008 MT 258N (unpublished)*

After the employer failed to preserve its objections to a jury instruction and special verdict form, the Supreme Court gave no merit to its appeal. Because of this cut-and-dried issue, this is a non-cite opinion.

Karl Buechsenschuetz worked as a physician for Northern Rockies Orthopaedic Specialists. When he hired on, he signed an employment agreement that said NROS would consider him for partner after two years. When the two years rolled by, NROS deferred making Buechsenschuetz partner. Later, Buechsenschuetz developed a movement disorder that forced him to miss three months' work. NROS discharged him when he tried to return from the medical leave. Buechsenschuetz filed a wrongful-discharge claim.

As the case was going to trial, the district judge instructed the parties to file written objections to proposed jury instructions. NROS didn't. One instruction said the employment agreement constituted a written personnel policy. Only after Buechsenschuetz's opening statement did NROS object to the instruction and move for a mistrial. District Court denied the motion, and the jury found for Buechsenschuetz. NROS appealed.

Buechsenschuetz contested the appeal on the grounds that NROS had failed to object during District Court's preliminary order. In addition, NROS failed to submit an alternative instruction. Similarly, NROS had failed to object or offer an alternative to District Court's special verdict form given to the jury. The Supreme Court agreed: "We will not review the propriety of jury instructions or special verdicts where the party has failed to preserve those issues for appeal."

*Zier v. Hancock, et al. (2008) — **contract, WDEA** 345 Mont. 89, 189 P.3d 1193*

Two letters of agreement without an end date and stating unfulfilled contingencies could not give rise to the contract claims brought by the plaintiff. The dispute properly belonged under the Wrongful Discharge from Employment Act, but the statute of limitations had already run.

Alex Zier and Pat Davison laid plans to open a new bank in Billings. They got Beartooth Bank to join in the venture. Zier signed two agreement letters with Beartooth. The letters stated salary and benefits and provided that Zier would become president of the new bank upon receiving a contingent charter from the State of Montana and approval from the FDIC. Neither letter stated an end date.

Zier left his old job and began working full-time on the venture. Before either of the contingencies stated in the letters came to pass, the Beartooth Board of Directors discharged Zier. He filed suit, alleging breach of contract. Beartooth argued that no contract existed and Zier's claim properly belonged under the WDEA. Zier said Beartooth had never hired him as bank president, so could not discharge him. District Court granted summary judgment to Beartooth, and Zier appealed.

Zier relied on the letters of agreement to make his case that Beartooth had never hired him, so could not have fired him. In his view, Beartooth had breached the agreement. Yet Zier admitted that he thought of himself as an "employee" of Beartooth. The Supreme Court found Zier's reliance misplaced: "a plaintiff must allege and prove that a contingency or condition precedent has been met where the right of recovery depends on its happening." In this case, Zier failed to show why Beartooth should face liability for breach of the agreement "when the conditions upon which the letters of agreement were based had not yet occurred." Zier's claim for discharge from his employment properly belonged under the WDEA as the exclusive remedy. And because he filed his suit 13 months after his discharge, Zier missed the one-year statute of limitations under the WDEA.

Fenno v. Mountain West Bank (2008) — ***WDEA, public policy, federal preemption***
345 Mont. 161, 192 P.3d 224

The Supreme Court held that the National Banking Act doesn't preempt the Wrongful Discharge from Employment Act. The decision enabled a former bank employee's wrongful discharge claim to move forward.

Dan Fenno worked for Mountain West Bank as an internal auditor. He discovered a potentially irregular loan transaction that pointed toward misconduct by a bank executive. He reported his finding to the audit committee and executive committee. According to Fenno, this led the bank to reduce his duties, remove him from two boards, and cut his salary before eventually discharging him.

Fenno filed suit under the WDEA, alleging that his discharge was retaliation for reporting a violation of public policy. Mountain West responded that federal law preempted Fenno's state claim. The National Banking Act contains two applicable sections. One section prohibits discrimination for reporting bank misconduct to any federal banking agency or to the U.S. Attorney General. The other section says bank officers serve "at the pleasure" of the bank's board of directors. District Court granted summary judgment to Mountain West, holding that these specific sections preempted Montana's WDEA.

Fenno's appeal led the Supreme Court to examine possible types of preemption. The Court described three types: (1) express preemption – Congress includes a preemption clause; (2) field preemption – an implied result when federal law is so comprehensive that it "occupies the field" of law, leaving no room for state regulation; (3) conflict preemption – where state law obstructs the full purpose and objective of Congressional action. The first two didn't apply to this situation, but District Court had held the WDEA to be in conflict with the federal Act.

After examining cases from various jurisdictions, the Supreme Court concluded otherwise: "The National Act has not preempted completely state law governing employee relations." In reversing summary judgment, the Court said, "No conflict exists between the policies underlying the Montana law and the federal statutes." With this holding, the Court declined to address the "at please" provision of the federal Act.

Justice Warner dissented, joined by Chief Justice Gray. Warner first pointed out the "at pleasure" provision of the federal Act. The sole exception protected employees who reported bank misconduct to any federal banking agency or to the U.S. Attorney General. Fenno did neither; he reported his findings internally, thus invoking the protection of the WDEA. "Mountain West may be found liable in a Montana court for exercising its statutory right under federal law to terminate Fenno's employment. In this situation, federal law preempts the WDEA."

Becker v. Rosebud Operating Service, Inc. (2008) — ***WDEA, good cause*** *345 Mont. 368, 191 P.3d 435*

Calling his boss a "prick" during a heated argument turned out to be a bad career move for the plaintiff. The Supreme Court upheld summary judgment for the employer.

Tom Becker worked as a fuel tech for Rosebud's power plant in Colstrip. In the fall of 2004, he asked for a lateral transfer but withdrew the request when he learned it would mean a big pay cut. In his letter of withdrawal, Becker hinted that union representation might afford better results. Becker alleged he began to "sense hostility" from management after dropping that hint.

In January 2005, the maintenance manager led Becker and other techs on walk-through of a plant system that had recently malfunctioned. Becker acted argumentative during this walk-through, so the maintenance manager took him to see the plant manager. This led to a three-way argument in the plant manager's office. The manager told Becker to leave, and Becker asked if he was fired. No, said the manager, Becker was on administrative leave until he calmed down. Becker then called the manager a prick and got fired.

Rosebud followed up with a letter to Becker, explaining his discharge due to "unruly behavior, threatening attitude and abusive language." The company's policy also cited "profane or abusive language" as a serious breach of conduct. Becker filed a wrongful-discharge lawsuit, claiming that the alleged "good cause" was a pretext and that Rosebud really fired him for promoting unionization. District Court found Becker's pretext argument to be "speculation" and granted summary judgment to Rosebud.

Rosebud opposed Becker's appeal, pointing out that he had changed his legal theory. In District Court, Becker had pressed the pretext issue; on appeal, he argued that questions of fact should preclude the legal conclusion of good cause for discharge. The Supreme Court didn't find that Becker's argument had "significantly changed." It all came down to timing – did Becker swear at the managers *before* or *after* he got fired? All of the evidence, including Becker's own testimony, showed that Becker started cussing when the manager put him on administrative leave but before firing him.

Was Becker's behavior good cause for his discharge? Becker relied on *Arnold v. Yellowstone Mountain Club* (see page 170), when the Court found that, despite the employee's profanity, issues of fact precluded summary judgment. The Court distinguished the cases: "For purposes of determining good cause, the confrontational verbal assault and disruptive language Becker directed at his supervisors is clearly distinguishable from the frustrated comment Arnold made as she exited her employer's office." Becker also argued that foul language was common at Rosebud. The Court recognized that profanity may occur "throughout the course of an ordinary workday," but it's more serious to escalate a tense situation by cussing at your bosses. The Court affirmed summary judgment.

Tuttle v. Department of Justice, Montana Highway Patrol (2008) — ***WDEA, exemption*** *2008 MT 456N (unpublished)*

Plaintiff brought this second appeal (see page 186), in an attempt to challenge his discharge under the Wrongful Discharge from Employment Act. In this non-cite decision, the Supreme Court affirmed summary judgment, holding that the statutory process in the first case exempted the WDEA.

The Highway Patrol discharged Mitch Tuttle for misconduct. He contested the action through an administrative process under statute. After an adverse result, he petitioned for judicial review. While that case was pending, he filed this action under the Wrongful Discharge from Employment Act. After the Supreme Court upheld his termination, the Patrol moved for summary judgment in this case. District Court granted the motion, and Tuttle appealed.

Tuttle argued that the administrative process applied to "pre-termination disciplinary actions." Even if the statute applied to "post-termination" remedies, it only looked at good cause, and not whether the agency had properly applied its personnel policy. The Patrol argued that the statutory process provided an avenue for Tuttle to seek a remedy, so the WDEA disallowed a wrongful-discharge action (39-2-912, MCA). In addition, Tuttle's prior litigation gave rise to the doctrine of "claim preclusion." The Supreme Court affirmed summary judgment.

The 2009 Legislature amended the statute that governed Tuttle's initial administrative process: "A discharge after a hearing is exempt from the Wrongful Discharge From Employment Act as provided in 39-2-912." (44-1-806(2), MCA)

Dean v. Sanders County (2009) — ***WDEA, good cause*** *350 Mont. 8, 204 P.3d 722*

After a county employee was arrested for being part of a marijuana-selling operation, the County had good cause to discharge her. The Supreme Court affirmed a jury verdict in favor of the County.

For the most part, this case dealt with circumstances of Jackie Dean's arrest and with the criminal evidence entered into her civil suit against the Sanders County. Dean worked as administrative assistant to the County Commissioners. Based on reliable information, law enforcement set up an undercover operation.

An informant delivered money to Dean at the courthouse to buy marijuana from a dealer in Trout Creek. This led to her arrest and further evidence that she was involved in using and selling pot.

The County suspended Dean with pay as the investigation progressed. At the end of the investigation, the County discharged her. Dean sued the County, claiming negligence, false imprisonment, and wrongful discharge. The wrongful discharge count alleged lack of good cause. The case went before a jury, which returned a verdict in favor of the County on all counts.

On appeal, the only question related to Dean's discharge focused on evidence of her past drug use and other wrongful acts. She argued that District Court erred in allowing the evidence. The Supreme Court found, "Evidence of Dean's ... marijuana use is relevant to prove the County terminated her for good cause."

Teamsters Union Local No. 2 v. C.N.H. Acquisitions, Inc. (2009) — ***collective bargaining agreement, arbitration, procedure*** *350 Mont. 18, 204 P.3d 733*

This was a procedural decision dealing with in an unusual case in which a district judge granted summary judgment that his predecessor had denied. The Supreme Court affirmed.

Sherrill Hennelly worked as a nurse at Crest Nursing Home, the business name of C.N.H. Acquisitions. When Crest discharged her, the Teamsters Union carried her grievance under the collective bargaining agreement. The issue focused on the CBA's requirement that Crest provide notice of termination within 10 days of the precipitating incident. An arbitration panel found in Hennelly's favor and ordered her reinstated. Crest refused to reinstate her, and the union filed this action to enforce arbitration.

Crest argued that the arbitration panel exceeded its authority by deciding a procedural issue; the stipulations to arbitration had focused on good cause for termination and said, "There are no procedural issues before the panel." In court filings, Crest alleged that Hennelly was an impaired nurse, so reinstating her would violate public policy. The union countered that the 10-day notice had not been excluded in stipulations, and Crest hadn't objected to the issue when presented to the panel. District Court denied the union's motion for summary judgment.

Within a few days of this decision, the district judge retired. About a month later, the union renewed its motion for summary judgment. The new judge granted it, but denied attorney fees to the union. The effect of the ruling would have been to enforce the arbitration. Crest appealed.

Crest complained that one judge had overruled another sitting on the same case. The Supreme Court agreed that once an issue is decided, "that should be the end of the matter." But, said the Court, "this rule is not an imperative." In this case, the first judge had waived oral argument and had limited time to consider the record. The second judge was able to consider "further information and argument." The Court ruled it was okay for District Court to consider the union's renewed motion.

Did that mean the subsequent summary judgment was proper? Crest brought up the "procedural issue," calling it a fact issue that precluded summary judgment. The Court noted conflicting statements about the stipulation, but said they were irrelevant. The arbitration panel found the violation of 10-day notice breached the collective bargaining agreement. "When the arbitral decision draws its essence from the CBA, as it does in this case, courts are to enforce the award. This remains so even when the basis for the arbitrator's decision may be ambiguous."

Crest also argued that whether Hennelley was an "impaired nurse" presented a factual issue. The Court disagreed: "The violation of public policy exception to court enforcement of arbitrators' decisions does not apply under the facts presented in this case." A court could step in only if "the record clearly shows the grievant is likely to engage in wrongful conduct which violates public policy in the future ..." Summary judgment was proper.

The union cross-appealed the denial of attorney fees, asserting that Crest had "acted in bad faith." The Court ruled that District Court had duly considered the evidence and had not abused discretion in denying attorney fees.

*Power v. PAR Electrical Contractors, Inc. (2009) — **WDEA, procedure** 2009 MT 104N (unpublished)*

In this non-cite opinion, the Supreme Court affirmed a jury verdict in favor of the plaintiff. The case examined "legitimate business reasons" for discharge.

After PAR Electrical Contractors discharged Tom Power, he filed a wrongful discharge action. PAR moved for summary judgment on the basis that its reduction in force was a legitimate business reason to discharge Power. District Court denied the motion, and the case went to trial. The jury awarded Power $252,428, and PAR appealed.

The issue centered on competing jury instructions. PAR had proposed two instructions that focused on "economic conditions" and "reduction in work force" to support its legitimate business reason. In the end, the District Court had issued instructions that focused on the definition of legitimate business reason from *Buck v. Billings Montana Chevrolet* (see page 70). The court's instructions also said that an employer doesn't have an obligation to find another job for the terminated employee. PAR's appeal contended that lack of instruction on economic conditions caused it material prejudice. The Supreme Court found that District Court "applied well settled Montana law to the facts of this case" and did not abuse discretion instructing the jury.

*Johnson v. Columbia Falls Aluminum Company LLC (2009) — **collective bargaining agreement, statute** 2009 MT 108N (unpublished)*

A positive drug test on the job due to using medical marijuana off the job was proper grounds for discharge in this case. The Supreme Court affirmed District Court's summary judgment in this non-cite opinion.

As a result of work-related injuries, Mike Johnson treated his pain with marijuana. A doctor supervised the treatment, which took place off the job using marijuana bought with personal funds. Johnson didn't tell his employer about this treatment. Columbia Falls Aluminum Company had a drug-testing policy that warned of disciplinary consequences for positive tests. When Johnson tested positive, CFAC suspended him and offered a "last-chance agreement." Johnson didn't sign it, and CFAC discharged him.

Johnson started his litigation by invoking several statutes, including the Wrongful Discharge from Employment Act, the Blacklisting Act, the Americans with Disabilities Act, and the Human Rights Act. After some legal wrangling, he amended his complaint to withdraw his WDEA and blacklisting claims, and added negligence claims under Montana's Medical Marijuana Act. CFAC argued that the federal Labor Management Relations Act preempted Johnson's claims. He tried to amend his suit again, claiming breach of the collective bargaining agreement and violation of his constitutional right of privacy.

District Court granted CFAC's motion to dismiss; the court ruled that Johnson failed to state claims for relief or the claims were federally preempted. Johnson tried to revive his ADA and human rights claims with a "right to sue" letter from the Human Rights Bureau, and the court ruled that he failed to state an adequate claim because of the specific language of the Medical Marijuana Act.

Johnson's appeal to the Supreme Court didn't get far. His negligence claims rested on the Medical Marijuana Act. However, that law does not require an employer to accommodate the medical use of marijuana. Furthermore, the resolution of his claims would rely on interpreting CFAC's policy and the collective bargaining agreement. The Labor Management Relations Act preempts such interpretation in state court. His

privacy claim didn't fly because "the privacy section of the Montana Constitution applies only to state action."

Stevenson v. Felco Industries, Inc. (2009) — ***discrimination, procedure*** *352 Mont. 303, 216 P.3d 763*

In this age-discrimination case, District Court allowed introduction of an administrative investigation as a form of "sanction" against the plaintiff. The Supreme Court found this to be reversible error.

Ed Stevenson worked as a traveling salesman for Felco Industries, selling specialty equipment to contractors. His first nine years on the job went fine. In 2004, a young engineer took over as general manager of the company. He instituted a "cold-call" quota that Stevenson failed to meet. In 2005, at the age of 66, Stevenson lost his job. A young man in his 30s replaced Stevenson.

Stevenson filed a discrimination claim with the Montana Human Rights Bureau. The subsequent investigation yielded a "no-cause finding" of no reasonable basis to believe discrimination had occurred. Stevenson then took his case to court. Much of the outcome turned on events prior to trial. Felco was late in filing its witnesses and exhibits, but Stevenson didn't object. Felco's list, and the court's pretrial order, included the HRB report. Stevenson tried to file a later motion, but withdrew it because it was well past the court's deadline. When the case when to trial, Stevenson objected to having the HRB report introduced as evidence. The district judge overruled because Stevenson hadn't objected at earlier stages. The jury found for Felco, and Stevenson appealed.

Stevenson first argued that District Court had excluded his proposed jury instruction on the "motivating factor" for his discharge. Stevenson said that Felco gave "direct testimony" that his age was a motivating factor. The testimony in question referred to Stevenson's own stated desire to "slow down." The testimony came from Felco's owner, 82 years old at the time, who said it was necessary to speed up, not slow down. The Supreme Court found that this testimony was not direct evidence of age discrimination; the jury instruction was properly excluded.

Stevenson next argued that the HRB report was hearsay evidence improperly admitted at trial. Felco contended that Stevenson waived his objection to the report by failing to meet the deadline for pretrial motions. In any event, Felco said, Stevenson examined his manager at trial by asking about a letter to the HRB investigator. And all in all, the report harmlessly added to the cumulative evidence that Stevenson lost his job because of poor performance, not his age.

Given precedent and Rule of Evidence 803(8)(iv), the Court found the HRB report to be "patently inadmissible." The Court also found no grounds for ruling that Stevenson had waived his objection by failing to file a pretrial motion in limine. "While the District Court did not call the 'waiver' threat a sanction, waiver of the right to object to inadmissible evidence at trial is nonetheless a sanction, especially since it resulted here in the admission of patently inadmissible evidence." While courts have broad discretion over admissibility, the use of a sanction to allow inadmissible evidence was error. On this basis, the Court reversed the jury verdict and remanded the case for a new trial.

Justice Rice dissented. First off, he found "clear evidence in support of the jury's verdict that Stevenson was not the victim of age discrimination." Regarding the HRB report, Rice wrote, "District Court did not deny Stevenson his right to object; the court simply required a timely objection, which Stevenson failed to make." In doing so, he waived his right to object. The majority's analysis of "sanction," in Rice's view, was unnecessary; admitting the report was "harmless error."

Bryden v. Lakeside Ventures, LLC (2009) — ***WDEA, default, procedure*** *352 Mont. 452, 218 P.3d 61*

A quick series of events resulted in the Clerk of Court entering a default judgment for the plaintiff. Be-

cause the damages could not be "sum certain" without court proceedings, the Clerk exceeded authority. The Supreme Court reversed the judgment.

Lori Bryden managed the Homestead Café for Lakeside Ventures. When she grumbled about posting a "no gambling" policy for employees, her boss discharged her for "insubordination." Bryden lawyered up and prepared a complaint. Her boss's lawyer called it baloney, and the boss took off for an Alaskan vacation. Bryden then filed her suit, and a deputy sheriff served the kitchen manager at the café. The kitchen manager put the papers in a safe and told the new restaurant manager about them later that day. As soon as the answer period expired, she moved for entry of default, which the Clerk of Court entered. Bryden also moved for a default judgment of $140,000 in damages, which the Clerk also entered.

A few days later, Lakeside's attorney checked on the case while in the courthouse on other business. He was surprised to learn of the default, the judgment, and the writ of execution. He asked Bryden to vacate the judgment, but she refused. Lakeside then quickly moved District Court to quash the service of Bryden's complaint or to vacate the default judgment. District Court denied the motion, and Lakeside appealed.

The Supreme Court upheld the manner in which Bryden's complaint was served. When the deputy talked to the kitchen manager, it was reasonable for him to conclude that she had authority to accept service. However, the Court took exception to the default judgment. Bryden's prayer for $140,000 in damages under the Wrongful Discharge from Employment Act was based on four years' salary and claimed weekly bonuses. Lakeside argued that the amount was not capable of being made certain because the bonuses were dependent on meeting certain conditions.

The Court cited Rule 55 of the Rules of Civil Procedure: a clerk of court may enter default judgment if (1) the claim is for sum certain, (2) the default results from failure to appear, and (3) the defendant is not an infant or incompetent. In all other cases, only District Court can enter a default judgment. Bryden argued that her claim of lost wages constituted "statutory damages." But statutory damages, observed the Court, involve a specific figure set by statute. The WDEA doesn't list a specific figure. Rather, the "specific amount of wages and benefits to which the employee may be entitled presents a potential factual question." In addition, the WDEA requires deduction of interim earnings, which a court must determine. "District Court held no hearing in this case on the appropriateness of Bryden's claimed $140,000 in damages." The estimate of damages did not constitute sum certain.

The Court also took up the dispute over setting aside the default. Given the minimal communication between the parties and the quick succession of events, the Court found that Lakeside's failure to appear was not "willful." When combined with the principle that "every litigated case should be tried on its merits," the circumstances led the Court to overturn the default. The Court remanded the case to give Lakeside the 30-day window to answer Bryden's complaint.

Christie v. Department of Environmental Quality (2009) — ***judicial review, just cause, policy***
353 Mont. 227, __ P.3d __

A hearing examiner reviewing a discharge did not issue a finding of fact regarding the employee's misconduct. The task then fell to the agency director; the director did not improperly substitute his judgment on an issue the hearing examiner did not resolve. The employer's policy and guide supported the decision to discharge.

Keith Christie hired on as a staff attorney with the Department of Environmental Quality in May 2002. Of the course of his employment, he "struggled" with properly reporting his hours of work. He received a warning letter in 2004, requiring added steps in tracking his hours. In the spring of 2007, Christie's boss tracked his whereabouts for seven weeks. The boss noted big differences between the hours Christie claimed and the hours that he was at work. When confronted with the discrepancies, Christie gave feeble

explanations. DEQ discharged him for falsely reporting his time as a "manifestation of dishonesty and ... theft of state resources."

Christie grieved the discharge. A hearing took place. Christie argued for reinstatement, saying DEQ improperly considered the 2004 warning and failed to consider his good performance. The hearing examiner concluded that Christie had "exaggerated" his work hours but didn't enter a finding on whether the actions were intentional. The hearing examiner determined that DEQ didn't have just cause to discharge Christie and recommended reinstatement.

The Director of DEQ, Richard Opper, reviewed the findings and concluded that Christie had intentionally falsified his time records. Opper noted that the State Discipline Handling Guide support discharge for serious offenses such as falsification of records. Opper stated that the warning in 2004 put Christie on notice of the problem, so he couldn't claim that the issue was a first occurrence with respect to progressive discipline. In the end, Opper sustained Christie's discharge.

Christie petitioned District Court for judicial review. He argued that Opper had improperly substituted his judgment for that of the hearing examiner. He also argued that Opper had failed to apply the State's progressive discipline policy. DEQ responded that Opper hadn't substituted his judgment, he had made a key finding that the hearing examiner failed to make – that Christie had intentionally falsified his record. District Court affirmed DEQ's decision, saying Christie engaged in "a pattern of deception that no employer, public or private, is required to endure."

Christie appealed, saying there was inconsistent evidence about his intent. He maintained that the hearing examiner had found his records "were not dishonest." So, DEQ should have considered his total work record and applied progressive discipline. The Supreme Court disagreed. At issue, even in Christie's own words, was the "question of honesty." But it was a question that the hearing examiner had left unanswered. "Because the Hearing Examiner failed to address the basis for Christie's discharge, that task fell to Director Opper." Further, the Court said, "Substantial evidence exists in the record that Christie persistently and intentionally falsified his time records ..."

The Court also found Christie's argument about his good performance "without merit": "As set forth in the State Discipline Handling Guide, certain serious infractions do not require consideration of an employee's overall service record prior to termination." Even if that were the case, the State's discipline policy gives management the discretion to consider progressive discipline "on a case-by-case basis."

Christie also argued that District Court had improperly referred to the warning letter of 2004. The letter, he said, wasn't part of the administrative record and should have been removed from his personnel file in 2005. The Supreme Court said it didn't matter: "Christie's actions constituted just cause for termination by DEQ without regard to the 2004 warning letter." Any reference to the letter by District Court was harmless error.

*Blatter v. Park County Sheriff's Office (2009) — **statute** 2009 MT 424N (unpublished)*

The failure of the employer to object at trial led the Supreme Court to give no merit to its appeal of a jury decision. This non-cite opinion affirmed damages and reinstatement to the plaintiff.

In the circumstances of a jail-house romance between two detention officers, the Sheriff fired Deputy Blake Blatter. The Sheriff said Blatter spread a rumor about the romance, despite a "no-rumor" order, and refused to disclose the source of the rumor. The discharge cited the state law that provides for discharging a deputy, saying Blatter "willfully disobeyed orders" and "demonstrated gross inefficiency" (7-32-2107, MCA).

Under the same set of statutes, Blatter appealed his discharge in District Court (7-32-2109, MCA). A jury

found that his discharge was not proper under the law. The jury awarded damages of $95,997 and said that Blatter was entitled to reinstatement. The County appealed the decision.

The County complained that District Court had admitted irrelevant testimony and had allowed Blatter to introduce evidence that the Sheriff had other motives for discharging him. The Supreme Court noted that nothing precluded the deputy from introducing evidence of ulterior reasons. In addition, the County failed to object to Blatter's evidence at trial and failed to specify the evidence in its appeal.

The County also accused District Court of misconduct, including "anti-government" gestures and prejudicial cross-examination of the County's key witnesses. The County provided no support for these broad contentions. "More importantly," said the Court, "the County never objected to any of this – the questions or the gestures and demeanor – during the trial itself." The Court affirmed the jury's decision.

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appendix

the wrongful discharge from employment act

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39-2-901. Short title. This part may be cite d as the "Wrongful Discharge from Employment Act."

39-2-902. Purpose. This part sets forth certain rights and remedies with respect to wrongful discharge. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

39-2-904. Elements of wrongful discharge -- presumptive probationary period. (1) A discharge is wrongful only if:

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(c) the employer violated the express provisions of its own written personnel policy.

(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.

(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.

39-2-905. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-9-904(1)(a).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering,

emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided for in subsections (1) and (2). [see 27-1-221, MCA, regarding "actual fraud" and "actual malice."]

39-2-906 through 39-2-910 reserved.

39-2-911. Limitation of actions. An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharge employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

39-2-912. Exemptions. This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(2) of any employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

39-2-913. Preemption of common-law remedies. Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

39-2-914. Arbitration. (1) A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) a neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 37, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part shall apply.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(5) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [sections 1 through 8]. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

39-2-915. Effect of Rejection of Offer to Arbitrate. A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions. (1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product that:

(i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

(ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

(5) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

(a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;

(b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and

(c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action.

changes to legislative immunity (1991 Legislature)

(Additions are underlined; deletions are ~~interlined~~.)

2-9-111. Immunity from suit for legislative acts and omissions. (1) As used in this section: (a) the term "governmental entity" ~~includes~~ means only the state, counties, municipalities, and school districts, and any other local government entity or local political subdivision vested with legislative power by statute; (b) the term "legislative body" ~~includes~~ means only the legislature vested with legislative power by Article V of the Constitution of the State of Montana and ~~any local governmental entity given legislative powers by statute, including school boards~~ that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;

(c) (i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of the Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(II) the term legislative act does not include administrative actions undertaken in the execution of a law or public policy.

(2) a governmental entity is immune from suit for ~~an~~ a legislative act or omission ~~of~~ by its legislative body, or ~~a~~ any member~~, officer, or agent thereof~~ or staff of the legislative body, engaged in legislative acts.

(3) ~~A~~ Any member~~, officer,~~ or ~~agent~~ staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with ~~the introduction or consideration of legislation or action by~~ legislative acts of the legislative body.

(4) The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity does not waive the immunity provided by this section.

~~(4)~~ (5) The immunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.